*UNITED STATES–ANTI-DUMPING MEASURES ON CERTAIN HOT-ROLLED STEEL PRODUCTS FROM JAPAN*
**(DS 184)**

# FIRST SUBMISSION

# OF THE

# UNITED STATES OF AMERICA

**24 July 2000**

**United States – Anti-Dumping Measures**
**on Certain Hot-Rolled Steel Products From Japan (DS 184)**

**First Submission of the United States**

This first submission of the United States, filed in response to the submission of the Government of Japan ("Japan"), dated July 3, 2000, is divided into four separate parts, each of which is separately paginated and has its own series of paragraph and exhibit numbers.[1] Part A responds to Japan's description of the purported "Summary and Context" of the antidumping measures at issue, and clarifies the applicable standard of review. Part A also raises preliminary objections and urges the Panel to disregard (1) evidence that was not made available to U.S. authorities during the course of the antidumping investigation at issue, and (2) Japan's claim concerning the United States's general practice with respect to "facts available", which was not raised in Japan's request for the establishment of a panel and is therefore not included in this Panel's terms of reference.

In accordance with paragraph 12 of the Panel's working procedures we request that the Panel set a deadline of August 3, 2000, for any responses to these preliminary objections, and we request that the Panel rule on these preliminary objections at or before the first substantive meeting of the Panel on August 22.

Part B of this submission demonstrates that Japan's claims relating to the calculation of anti-dumping duty margins (the use of "facts available", the calculation of the "all others" rate of anti-dumping duties, and the exclusion of home market sales that are out of the ordinary course of trade) and critical circumstances, are baseless, and shows that both the U.S. law and the decisions of U.S. Department of Commerce are entirely consistent with the requirements of the Anti-Dumping Agreement.

Part B also notes that certain specific information on which the U.S. Department of Commerce based its "facts available" decision was submitted in confidence to the Department by Kawasaki Steel Corporation ("KSC") during the anti-dumping investigation, and is not now before the Panel. This information, identified in Part B, includes the minutes of three CSI Board of Directors meetings, confidential portions of the KSC sales verification report, the Department's analysis memorandum regarding CSI, and KSC's response to the Department's supplemental section A questionnaire. Under Article 6.5 of the Anti-Dumping Agreement and the Department's rules, the Department cannot disclose this information without the permission of the party submitting it, and so has identified this information through the use of empty double brackets("[[ ]]"). While the United States has been discussing this matter with KSC and expects that it will be resolved promptly, we nevertheless reserve the right to ask the Panel to

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[1] Therefore, references to pages or paragraph numbers in this submission should reference the part (A, B, C or D), as well as the page or paragraph number.

request that authorization to disclose be granted, at or before the first Panel meeting, currently scheduled for August 22, 2000.

Part C of this submission shows that Japan is incorrect in claiming that the U.S. International Trade Commission's ("USITC's") injury determination -- and the "captive production" provision itself -- is inconsistent with the Anti-Dumping Agreement. It shows that, in trying to support its claim, Japan has misrepresented the law, the USITC's practice, and the USITC determination in this particular investigation.

Finally, Part D shows that Japan's claims under Article X:3 of the GATT 1994 – which are based on the same actions alleged incorrectly to violate the Anti-Dumping Agreement – are groundless, and represent an attempt by Japan to ignore the rights and obligations of the Anti-Dumping Agreement. Part D also requests that the Panel deny Japan's request for a specific remedy, as contrary to the DSU and long-standing WTO practice.

**Requested Deadlines**

As provided for by paragraph 12 of the Panel's working procedures, the United States requests that the Panel set a deadline of August 3, 2000, for any responses to these preliminary objections identified above, and requests that the Panel rule on these preliminary objections at or before the first substantive meeting of the Panel on August 22.

**Business Confidential Information**

Part B of this submission contains information in brackets ("[]") that Japan has identified as Business Confidential. This information will be omitted from any versions of this submission that is released to the public. Part B omits Business Confidential information in double brackets ("[[]]") for which the United States has requested permission, from Japan and the pertinent Japanese producer, to release to the Panel under its working procedures. Exhibits to this submission which contain BCI are noted accordingly.

**United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products From Japan (DS 184)**

**First Submission of the United States**

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## PART A: INTRODUCTION; PRELIMINARY OBJECTIONS; STANDARD OF REVIEW

### I. Introduction

1. In its first written submission, the United States responds to the arguments presented by the Government of Japan ("Japan") in its first written submission. Japan argues that the Determination of the U.S. Department of Commerce ("Commerce" or "the Department") that exports of certain hot-rolled flat-rolled carbon-quality steel ("hot-rolled steel") from Japan were being dumped in the United States[1] and the Determination by the U.S. International Trade Commission ("USITC") that those imports were injuring the U.S. domestic producers of such steel[2] were, in various respects, inconsistent with the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Agreement"). Before turning to the merits of Japan's individual claims, however, we respond to the extensive and extraordinary introduction in Japan's submission, which attempts to prejudice this Panel by persuading it that the Department and the USITC deliberately conducted investigations that were biased and unfair.

2. According to Japan, Secretary of Commerce William Daley fixed the investigation even before it was initiated, by promising the U.S. steel industry that the Department would accelerate the proceeding and would be "very aggressive" in handling it.[3] Allegedly, Secretary Daley "kept his promise" by "accommodating the domestic industry"[4] in the following ways: accelerating the schedule for the investigation; making a determination of critical circumstances at an earlier point than normal on the basis of mere allegations and despite the fact that the USITC had found only threat of injury; failing to correct clerical errors in the preliminary determination; and, most importantly, extensively applying adverse facts available to the respondents. Finally, Japan alleges that the USITC joined in, improperly limiting its analysis of the domestic industry to two years of the period investigated.[5]

3. All this makes interesting reading - - everyone loves a conspiracy. And, like many interesting conspiracy theories, Japan's begins (although selectively) with facts that are well-known. Also like many conspiracy theories, however, it then amplifies those facts through

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[1] *See Notice of Final Determination of Sales at Less Than Fair Value of Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan ("LTFV Final Determination")*, 64 Fed. Reg. 24,329 (May 6, 1999) **(Exh. JP-12)**.

[2] *Certain Hot-Rolled Steel Products from Japan, Notice of USITC Final Injury Determination ("USITC Final Determination")*, 64 Fed. Reg. 33514 (June 23, 1999) **(Exh. JP-12)**.

[3] First Written Submission of the Government of Japan to the World Trade Organization, Doc. No. WT/DS184 (July 3, 2000) at para. 27, n. 25 and para. 30 (hereinafter "First Submission of Japan").

[4] *Id.* at paras. 30 and 31.

[5] *Id.* at para. 32.

conjecture and, finally, jumps to conclusions that are utterly unsupported. We address each of the elements of the supposed conspiracy below.

## A. Birth of the Supposed Conspiracy

4. As noted, the conspiracy theory begins with established facts. It is well known that, in response to the unprecedented surge in steel imports from Russia, Japan, and (to a lesser extent) Brazil that began in the spring of 1998, the U.S. domestic steel industry conducted a "stand up for steel" campaign in the United States in the fall of that year. This effort (and the articles Japan cites which relate to it) concerned steel as a whole, rather than hot-rolled steel. As Japan comes close to acknowledging, the campaign was directed overwhelmingly at the U.S. Congress, with the goal of securing the application of quotas on steel imports and amendments to the U.S. antidumping law.[6] As is also well known, both efforts failed.

5. At Commerce, the U.S. industry simply pressed the Department to accelerate its investigation and the point at which it determined whether critical circumstances existed, so that, if an order were entered, antidumping duties would become effective in time to prevent at least a portion of the export surge from escaping the duties. As we explain below, this acceleration was perfectly consistent with the Agreement and with U.S. law. Although Japan attempts to expand the acknowledged acceleration of the proceeding into a pervasive pattern of bias, there is no such pattern and, indeed, no general connection between the various elements in the determinations about which Japan complains. In fact, the only ways in which the Department departed from its standard practice in the investigation were by accelerating the investigation in certain respects and in not correcting the clerical error in its preliminary determination before the final determination.

6. The "smoking gun" in Japan's conspiracy theory seems to be Secretary Daley's reported promise to enforce the antidumping laws aggressively in this proceeding. This is frivolous. Every Secretary of Commerce routinely promises to enforce all of the laws within the Department's jurisdiction. No Secretary could ever say, in any context, that he or she would *not* vigorously enforce those laws. The Secretary's recital is not evidence of a conspiracy or of bias against Japan or Japanese steel exports. It was a standard affirmation that he would do his duty as a public servant.

## B. Acceleration of the Investigation

7. According to Japan, the Department accelerated its investigation *for the specific purpose of prejudicing the respondents*, by denying them adequate time to comply with the Department's

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[6] Id. at para. 27.

requests for information.[7] This is both inaccurate and highly misleading. The total time by which the investigation was shortened was 20 days.[8] These 20 days were taken from the time that the Department allowed itself to reach a preliminary determination *after* receiving the respondent's submissions.[9] None of the respondents' standard time-periods for submitting information was shortened.[10]

8. Most importantly, the respondents were given the normal time in which to answer the most detailed sections of the Department's questionnaire[11] - - 37 days.[12] In addition, all of the

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[7] Id. at para. 6.

[8] The normal length of an investigation is 215 days. 19 U.S.C. 1673d(a)(1) **(Exh. JP-4)**. This investigation was initiated on October 15, 1998, *Notice of Preliminary Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan* (hereinafter "*LTFV Preliminary Determination*"), 64 Fed. Reg. 8291, 8292 (February 19, 1999) **(Exh. JP-11)**, and completed on April 28, 1999, for a total of 195 days. The final determination was published on May 6, 1999. *LTFV Final Determination*, 64 Fed. Reg. at 24329 **(Exh. JP-12)**; *see also Hot-Rolled Flat-Rolled Carbon-Quality Steel Products AD Investigation Timetable* (Oct. 27, 1998); *Annex III – Deadlines for Parties in Antidumping Investigations*, 19 C.F.R. part 351.

[9] Section 733(b)(1)(A) requires that a preliminary determination be made "within 140 days after the date on which the administering authority initiates an investigation." 19 U.S.C. 1673b (b)(1)(A) **(Exh. JP-4)**. This investigation was initiated on October 15, 1998, and the preliminary determination was made on February 12, 1999, for a total of 120 days. The preliminary determination was published on February 19, 1999. *LTFV Preliminary Determination*, 64 Fed. Reg. 8291 **(Exh. JP-11)**.

[10] In fact, the Department provided the Japanese respondents with a significant amount of extra time to respond to the Section A supplemental questionnaire. Specifically, the Department "issued supplemental questionnaires for section A to NSC, NKK, and KSC on December 4, 1998. On December 11, 1998, the Department issued a letter to respondents informing them that the Department would consider these supplemental questions for section A to have been issued on January 4, 1999, in order to adhere to the schedule provided to all interested parties at the time of initiation." *LTFV Preliminary Determination*, 64 Fed. Reg. at 8292 **(Exh. JP-11)**. Therefore, the Japanese respondents had an extra month to prepare responses to the Section A supplemental questionnaire. The section B-E supplemental questionnaire was distributed to the Japanese respondents on January 4, 1999, and responses were received by the Department, after a seven-day extension, on January 25, 1999. In contrast, the petitioners had only one week to file comments on NSC's, NKK's, and KSC's section B-D questionnaires. *See id.*

[11] Sections B through E request data on U.S. and home market prices and on the cost of production.

[12] This refers to the most burdensome part of the questionnaires – Sections B, C, and D. Section A requests more general information about the respondent and is less burdensome. Respondents normally receive 21 days to respond to Section A, with the possibility of a seven-day extension. Such was the case here, as the Department issued Section A on October 20, 1998, and received responses from NSC, NKK, and KSC on November 16, 1998. *LTFV Preliminary Determination*, 64 Fed. Reg. at 8292 **(Exh. JP-11)**.

respondents asked for, and received, the standard fifteen-day extension of this period,[13] so that they had a total of 52 days to respond – the standard time for respondents in the Department's investigations and substantially more than the Agreement requires.[14] Second, as explained below, although the acceleration of the case may have *inconvenienced* the Japanese respondents, there is *no evidence whatsoever* that it prevented them from submitting necessary information.

9. By claiming that the Department accelerated its investigation to prejudice the exporters, Japan seeks to draw attention away from the real, and perfectly legitimate, reason for the acceleration - - because the massive surge in steel imports from Japan and Russia threatened to seriously undermine the relief that the antidumping law could provide. As the Department explained in its critical circumstances determination, this import surge began in the spring of 1998.[15] Over the period from May to September 1998, the volume of imports of hot-rolled steel from Japan exceeded the volume for the previous six months by 100 percent.[16] By way of comparison, this increase is more than *six times* the increase in the volume of imports (15 percent) required to find critical circumstances under the U.S. antidumping regulations,[17] a standard that Japan has not challenged here. With Japanese steel exports pouring into the United States in such quantities, the U.S. domestic industry had a perfectly legitimate reason to request that whatever relief could be obtained under the statute be provided as promptly as possible.

10. Finally, Japan fails to acknowledge that, although the Department accelerated its investigation in the context of the massive import surge from Japan involved here, the new procedures are by no means confined either to this proceeding or to Japan. They have been applied in other investigations[18] and will be applied uniformly whenever comparable export

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[13] *See id.* ("[O]n October 30, 1998, the Department issued sections B-E of an antidumping questionnaire to NSC, NKK, and KSC." and "On December 21, 1998, we received responses to sections B, C, and D of the questionnaire from NSC, NKK, and KSC.")

[14] *See* Article 6.1.1 of the Agreement.

[15] *See Critical Circumstances Preliminary Determination*, 63 Fed. Reg. 65750 (Nov. 30, 1998) **(Exh. JP-9)** and accompanying memorandum to the file (Nov. 23, 1998) (*"Preliminary Critical Circumstances Memo"*) **(Exh. US/B-42)**.

[16] *Id.*

[17] 19 C.F.R. § 351.206(h)(1)(iii) **(Exh. JP-5)**.

[18] *See Preliminary Determination of Critical Circumstances: Solid Fertilizer Grade Ammonium Nitrate from the Russian Federation*, 64 Fed. Reg. 60422 (Nov. 5, 1999) **(Exh. US/B-47)**; *Preliminary Determination of Critical Circumstances: Certain Cut-to-Length Carbon-Quality Steel Plate from Japan*, 64 Fed. Reg. 20251 (Apr. 26, 1999); *Preliminary Determination of Critical Circumstances: Certain Non-Frozen Apple Juice Concentrate from the People's Republic of China*, 64 Fed. Reg. 61835 (Nov. 15, 1999).

surges occur.[19]

### C. Critical Circumstances

11. The next piece of the supposed conspiracy was the critical circumstances determination. Here again, Japan begins with an acknowledged fact - - like the general acceleration of the case, the acceleration of the critical circumstances determination was the direct result of the export surge. According to Japan, however, there are several aspects of the early determination that cannot be so easily explained: basing the preliminary determination on information from the petition and a preliminary determination of threat of injury by the USITC; and moving the period that was examined in order to determine whether there was an import surge. We address the substance of these arguments in the body of our submission, but offer some general considerations here relating to whether these actions should be seen as part of a general effort to prejudice the Japanese exporters.

12. To begin with, it is essential to recall the purpose of the critical circumstances provision, which is to preserve the effectiveness of antidumping measures in the face of import surges. In the normal course of events, provisional measures may be applied no sooner than 60 days after the initiation of the investigation.[20] The critical circumstances provision provides an exception to this rule where (among other conditions) there have been massive imports.[21] The reason for the exception is clear - - to prevent exporters from flooding a targeted market with a large volume of dumped goods before antidumping duties can be applied. The remedy is imperfect, because the domestic industry in the importing country cannot file a case until it has enough evidence to sustain an injury determination. While the industry is waiting to be injured, the importers may be able to stockpile enough dumped imports to last them for a year or more. Consequently, a critical circumstances determination often will not cover all of the imports in such a surge. By advancing the onset of duties by two or three months, however, it can provide some relief.

#### 1. Accelerated Date of Critical Circumstances Determination

13. The Department made its preliminary determination that critical circumstances existed on November 23, 1998, - - 46 days after initiating the investigation. At that time, Commerce did not impose any provisional measures (such as withholding appraisement) whatsoever.

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[19] *See Change in Policy Regarding Timing of Issuance of Critical Circumstances Determinations*, 63 Fed. Reg. 55364 (October 15, 1998) **(Exh. JP-3)**.

[20] Article 7.3 of the Agreement.

[21] Article 10.6 of the Agreement. Article 10.8 provides that in no case may antidumping duties be imposed upon imports prior to the date the investigation was initiated.

Provisional measures were not imposed until 81 days later, when the Department made its preliminary determination of dumping.[22] These provisional measures were then made retroactive by 90 days, *exactly* as if the preliminary determination of critical circumstances had accompanied the Department's preliminary determination of dumping. Commerce's delay in withholding appraisement was more favorable to Japanese exporters than Article 10.7 of the Agreement required. Article 10.7 would have allowed the Department to begin withholding appraisement as soon as it made the preliminary determination of critical circumstances.

14. Japan's argument that the Department could not modify its practice to accommodate the special circumstances of this investigation implies that, once the Department had decided to accelerate the investigation and stated that it would enforce the antidumping law vigorously, it was no longer free to introduce changes to its procedures or methodology in the investigation, even if those procedures and changes in methodology were directly attributable to the unique circumstances before it. There is no basis for such a claim.

15. Japan claims that the *early preliminary determination* of critical circumstances shut down exports of hot-rolled steel to the United States,[23] but this claim is utterly unsupported. The Department initiated its investigation on October 15, 1998, and promptly announced that it would issue its preliminary determination 120 days later. The petitioners had *alleged* critical circumstances in their application for initiation,[24] so that the exporters would have been well aware from the outset that antidumping duties potentially could be applied beginning 90 days before the date of the preliminary determination. Once the exporters knew that the preliminary determination was scheduled for February 12, 1999 (and would be published about one week later), they had only to subtract 90 days from the publication date to know that their exports could become subject to anti-dumping duties beginning around November 21, 1998 (about five weeks after the investigation was initiated)[25]. This would have been equally true had the Department *not* made its preliminary determination of critical circumstances early. Thus, the acceleration of the preliminary determination simply confirmed what the exporters already knew - - that the application of antidumping duties as of about November 21, 1988, was a possibility.[26]

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[22] *Critical Circumstances Preliminary Determination*, 63 Fed. Reg. 65750 **(Exh. JP-9).**

[23] First Submission of Japan at para. 171.

[24] *Petition for the Imposition of Antidumping Duties: Certain Hot-Rolled Carbon Steel Flat Products from Japan* (Sept. 30, 1998) **(Exh. US/B-40(a)(b)&(c))**.

[25] 19 U.S.C. 1673b(e)(1).

[26] This possibility was real, because the final margin for KSC was well over the 25 percent threshold for critical circumstances.

16. Of course, the possibility that retroactive duties would be applied was always fairly remote (and remained so after Commerce's early preliminary determination of critical circumstances) because of the well-known fact that the USITC rarely makes affirmative determinations on critical circumstances.[27] This being the case, the Department's early preliminary determination of critical circumstances simply put importers on notice that, if the Department confirmed its finding in its final determination, and if the importers' steel were found to have been dumped, and if the USITC determined that there was injury and that imports during the period covered by the critical circumstances determination were likely to undermine seriously the remedial effect of the order, their exports would become subject to antidumping duties as of approximately November 21, 1988. As it turned out, of course, the USITC did not make an affirmative finding on the issue and no duties ever were or will be collected for the period before the preliminary determination.

17. In sum, the Department's early preliminary determination had no effect whatsoever, other than making a fairly remote possibility - - that in fact never occurred - - a bit less remote. The investigation itself and the *allegation* of critical circumstances led the Japanese exporters to reduce their exports (presumably, because they knew they could not sell in the United States without dumping), not the early determination of critical circumstances.

### 2. Knowledge of Dumping and Injury

18. Japan next criticizes the Department's determination that the importers were, or should have been, aware that the exporters practiced dumping that would cause injury before its own preliminary determination of dumping and on the basis of the USITC's preliminary determination that found only a threat of injury.[28] Japan has three complaints.

19. First, Japan argues that the Department "blindly accepted" mere allegations of dumping in the petition.[29] This is highly misleading. As we show below, the allegations in the petition were backed up with very substantial evidence

20. Second, Japan complains that the Department's reliance on press articles as evidence that there was widespread knowledge that an antidumping petition would be filed was unreasonable. In fact, the press articles reflect what plainly was common knowledge in the industry. In any

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[27] The USITC has made affirmative determinations of critical circumstances in only three investigations since 1988.

[28] First Submission of Japan at para. 26.

[29] First Submission of Japan at para. 182.

event, Japan's implication that its exporters were caught off-guard[30] is misplaced given that, earlier in its submission, Japan observes that there has been an epidemic of antidumping petitions in the steel industry since 1997, so that antidumping orders now cover 80 percent of Japan's steel exports to the United States.[31] If antidumping petitions against Japan are so endemic and so routinely successful, then it would seem that any Japanese steel exporter could be expected to figure out that becoming the subject of an antidumping investigation and order in the United States was a realistic possibility.

21. At the very least, the well-known situation in the steel industry makes it inconceivable that the Japanese exporters were not closely monitoring the situation in the United States. These exporters are hardly mom-and-pop operations. They are large and sophisticated corporations with ample resources to monitor market conditions, including the probability that antidumping proceedings will be initiated in the United States and succeed.

22. Third, Japan complains that the USITC's preliminary determination that there was threat of injury was not evidence that the importers knew or should have known that the dumping would cause injury. This argument rests on an interpretation of the Agreement that is simply wrong. A determination that there is threat of injury is an affirmative determination of injury, pursuant to which antidumping duties may be assessed under the Agreement. We address this argument in detail below.

### 3. Periods Compared to Determine Whether Imports Were Massive

23. Japan's next charge is that it was somehow improper or unfair for the Department to change the periods it examined to determine whether there was an export surge. In Japan's view, the fact that the antidumping petition was filed after the export surge began, rather than just before it began, required the Department to proceed as if that massive import surge had never happened and was not continuing.

24. This argument is utterly specious. The Agreement simply provides that the massive dumped imports must have occurred "in a relatively short period of time."[32] It does not stipulate any precise periods. Presumably, there is no question that a 100 percent increase in imports from one six-month period to the next is a massive increase over a relatively short period, regardless of

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[30] *Id.* at para. 202.

[31] *Id.* at para. 41. Of course, Japan omits the obvious explanation that this has been a perfectly legitimate response to an epidemic of dumping. Repeated recourse to antidumping measures in response to repeated dumping is not an abuse of such measures.

[32] Article 10.6(ii) of the Agreement.

whether that increase is sustained.

25. Japan argues, however, that, having established a different time period as the "normal" (but by no means the absolute) rule in its regulations,[33] the Department was somehow prevented from changing that period. There is no basis for this claim. The Department's regulations provide that it will "normally" compare the three months following initiation to the three months preceding initiation.[34] This covers the situation where the exporters learn of the investigation when it is initiated, and then try to beat the preliminary determination with an export surge. In the steel industry, however, dumping cases are common (as Japan has been at pains to point out) and the large and sophisticated exporters are well aware of the possibility of antidumping investigations well before petitions are filed. In this case, the Japanese exporters simply launched the export surge in the spring of 1998 (apparently because their domestic demand declined) and continued exporting in high volumes until after the investigation was initiated.

26. Had the Department confined itself to the "normal" period in these circumstances, it would have missed the surge altogether, because it had been underway for more than three months when the investigation was initiated. Most likely, the reason why the petition was not filed as soon as the surge began was that the domestic industry needed data for another quarter of a year to establish its case for injury. Whatever the reason, there is no basis in either the Agreement or the Department's regulations for punishing the domestic industry for the delay in applying for the initiation of an investigation by depriving it of the critical circumstances provision.

27. Japan's argument implies that it was somehow "cheating" for Commerce to take account of the fact that the massive export surge occurred slightly before its "normal" period of inquiry. In effect. Japan argues that it is entitled to create a loophole in the critical circumstances rule by turning a discretionary guideline in the Department's regulations into an absolute rule, notwithstanding that there is nothing in the Agreement to require such a rule. To top it off, Japan implies that refusing to create such a loophole must have been an element of a broad conspiracy, rather than simple common sense.

### D. Failure to Correct the Clerical Error in the Preliminary Determination

28. First of all, it is worth noting that the United States is the only country in the world that

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[33] 19 C.F.R. § 351.206(i) **(Exh. JP-5)**. The U.S. statute, 19 U.S.C. § 1677(e) also does not provide an exact time, simply paraphrasing the requirement of the Agreement that the imports should have been made "over a relatively short period."

[34] *Id.*

has a procedure (other than final determinations) for correcting clerical errors in preliminary determinations. The United States provides this procedure so that respondents will not be unnecessarily disadvantaged in the few months between the preliminary and final determinations. The reason that no other country offers this extraordinary protection for foreign respondents is that the Agreement does not come close to requiring that such protection be granted.

29. Japan claims that NKK was prejudiced by the Department's omission because the Department would not have found critical circumstances for NKK if it had corrected the error earlier. But this claim of harm is based on the presumption that NKK would not have stopped exporting, had the error been corrected. As we have seen, however, NKK had to make its decision about whether to stop exporting (or stop dumping) before November 21, 1998. Once the preliminary determination was made, 90 days later, it was too late for NKK to change its decision and make up for the lost exports, regardless of whether the margin had been less than 25 percent to begin with, or lowered below 25 percent as the result of the correction of a clerical error. So Japan's claim is not based on any *real* harm - - it simply provides "atmosphere" for the conspiracy theory.

### E. Application of the Facts Available

30. Although Japan highlights the fact that the investigation was accelerated, and claims that the acceleration prejudiced the respondent companies,[35] it has failed even *to allege* that a single instance in which the Department resorted to the facts available was attributable to the acceleration of the case. Japan complains of only two instances in which the Department resorted to facts available in the investigation,[36] and time demonstrably was not a factor in either instance. In the case of the sales from KSC's joint venture CSI, Japan has emphasized that CSI absolutely refused to supply the missing data. This means that CSI would not have supplied the data, even if it had been given six months to do so. In the case of the actual/theoretical weight problem (which affected a small number of sales for NKK and NSC and had a *tiny* effect upon the margin), Japan acknowledges that those companies' failure to submit conversion factors was based on their mistaken belief that this was impossible,[37] not because there was not time in which to calculate the factors. Neither company had any trouble calculating conversion factors quickly, once it had decided to do so.[38]

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[35] First Submission of Japan at para. 25.

[36] First Submission of Japan at paras. 61 - 72 and paras. 91 - 102.

[37] First Submission of Japan at para. 93 and para. 95.

[38] First Submission of Japan at paras. 97 - 98.

31. When Japan's ultimate argument on application of the facts available is considered, the reason why it wants the Panel to view these determinations as tainted by bias, and particularly by the acceleration of the investigation, becomes clear. Japan candidly asks the panel to interpret Article 6.8 of the Agreement so that it cannot be used "to induce respondents to provide complete and accurate information."[39] The consequences of agreeing to this request are obvious - - with no incentive to cooperate, respondents will not cooperate. Antidumping investigations therefore will become impracticable. Given that it effectively is asking this Panel to render the entire Agreement inoperable, it is easy to see why Japan wants the Panel to believe that it is dealing with investigating authorities who are biased and unfair.

### F. The Injury Determination

32. Last, Japan suggests that the conspiracy to deprive the Japanese respondents of their rights under the Agreement in this investigation extended to the USCIT and its injury determination.[40] Japan presents absolutely no basis for concluding that the USITC decision was biased. The newspaper articles upon which Japan relies to suggest that the Department was biased do not even mention the USITC. As will be discussed below, the USITC is an independent agency of the U.S. Government, not part of the Department of Commerce. Accordingly, to the extent that Japan seeks to misread Secretary Daley's statements as reflecting some improper motivation, Japan cannot impute such a motivation to the USITC Commissioners.

33. As we will demonstrate below, Japan's contentions that the USITC's determination employed methodologies inconsistent with its decisions in other cases are entirely misplaced. In fact, as the record of USITC's most recent decision on cold-rolled steel demonstrates, those methodologies are analytically neutral and were not used to favor the U.S. steel industry. The USITC's decision in *Certain Cold-Rolled Steel Products from Argentina, Brazil, Japan, Russia, South Africa and Thailand,*[41] puts the lie to Japan's insinuations that the USITC adopted the methodologies used in the hot-rolled steel investigation in order to assist the U.S. steel industry.

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[39] First Submission of Japan at para. 59.

[40] *Id.* at para. 32.

[41] Inv. Nos. 701-TA-393 and 731-TA-829-830, 833-834, 836, and 838 (Final), USITC Pub. No. 3283 (March 2000) (" *Cold-Rolled Steel Report*") **(Exh. US/A-3)**. The USITC reached a similar affirmative determination relying on the same investigative record in *Certain Cold-Rolled Steel Products from Turkey and Venezuela*, Inv. Nos. 731-TA-839-840, USITC Pub. No. 3297 (Final) ( May 2000) **(Exh. US/A-4)**. All but one of the Commissioners who made the more recent decision were the same as those who rendered the earlier decision at issue in the present proceeding. While the affirmative determination in the *Hot-Rolled* case was unanimous, only one Commissioner dissented from the negative determination in the *Cold-Rolled* case. U.S. steel producers have sued in the United States Court of International Trade to challenge these negative determinations.

In *Cold-Rolled Steel*, decided less than a year after its decision on *Hot-Rolled Steel Products* at issue here, the USITC reached a negative conclusion, denying the U.S. industry relief, using many of the same analytical techniques that Japan alleges demonstrates the USITC's bias in the current case.

34. For example, although the USITC found the captive production provision not to be applicable, nevertheless the USITC in *Cold-Rolled Steel*, like Commissioner Bragg in this case, made parallel findings concerning both captive production and merchant-market sales.[42] There, however, the USITC simply found that the evidence did not support an affirmative determination.

35. Likewise, the USITC's determination in *Cold-Rolled Steel*, as here, relied on the most recent trends for many factors, not only on trends over the entire investigatory period. In that case, although many trends over the entire period showed some decline, the more recent trends for many factors showed industry recovery at the end of the period.[43] Thus, the same approach which Japan alleges favors U.S. steel producers in the current case disadvantaged them in that case. Contrary to Japan's allegations, the analytical approaches that the USITC adopted in the *Hot-Rolled* investigation are not in the least unusual, nor do they in any way favor an affirmative result. Rather, the USITC determinations demonstrate that the USITC, in making both affirmative and negative determinations concerning steel production, simply adjudicated the facts as they appeared

36. The *Cold-Rolled Steel* decision also demonstrates how misplaced is Japan's contention that the USITC's findings on other asserted causes reflects bias. As will be discussed in more detail below, in that case, the USITC, as it did here, examined the effects on price declines of a strike at General Motors Corporation (GM). In both cases, the USITC found that the GM strike did have effects on the relevant industry, but in both it carefully analyzed the role that those effects had to assure that it did not ascribe to the dumped imports the effects of the strike. In the current case, the USITC concluded that the GM strike could only be regarded as a partial explanation of the fall in prices for hot-rolled products, which occurred as low-priced dumped

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[42] *See Cold-Rolled Steel Report* at 20-21 (reflecting import shares of total consumption and merchant market), 24 (reflecting parallelism in merchant market and total market domestic industry operating income) **(US/A-3)**.

[43] *See Cold-Rolled Steel Report* at 20-21 (though dumped import total volume and shares of total consumption and merchant market rose over period, they fell at end of period); 25 (though U.S. industry suffered overall market share loss, U.S. shipments grew at end of period; though capital expenditures declined, they showed strong growth in interim 1999) **(US/A-3).**

imports surged.[44] In *Cold-Rolled Steel*, in contrast, the USITC found that the timing of the work stoppage corresponded more closely with the drop in domestic prices that did the largest increase in subject imports.[45]

37. That decision, furthermore, belies the Japanese assertion that the USITC did not conduct an unbiased analysis of the effects of competition within the domestic industry. As is discussed below, the USITC rejected the argument that increased competition within the domestic industry caused by non-integrated producers ("minimills" or "EAF" producers) led to the industry's reduced performance. Rather, it found that minimills, more sensitive to import competition than integrated producers, suffered worse during the industry downturn of 1998 and that the increases in their capacity did not correspond with the asserted effects in 1998.[46] In *Cold-Rolled Steel*, the USITC also addressed the influence of competition within the domestic industry. There, the USITC found that falling hot-rolled prices had been beneficial to re-rollers, who purchase rather than produce, hot-rolled steel for cold-rolling, and found that, in part through them, the decline in hot-rolled steel prices put a downward pressure on cold-rolled steel prices.[47] In short, the USITC Commissioners did not bring closed minds to such issues; in each case, they made the decision to which they believed an objective analysis of the evidence should lead them.

38. Moreover, the face of the decision before this Panel demonstrates that none of the analytical approaches of which Japan complains was adopted for the purpose of reaching a particular outcome. Japan complains, for example, that four of the six USITC Commissioners relied either primarily or secondarily on analysis specific to merchant market sales. As will be shown below, Japan is simply wrong in arguing that this analysis caused the USITC Commissioners to ignore effects on the industry as a whole. In any event, the USITC determination shows that such findings concerning the merchant market segment cannot reasonably be used to suggest bias, since those Commissioners who made no such findings also made affirmative determinations. One, Commissioner Crawford, found material injury, and one, Commissioner Askey, found threat of material injury. Japan challenges neither of their findings. Japan cannot contend that findings specific to the merchant market were necessary to reaching an affirmative determination supporting the imposition of antidumping measures.

39. Similarly, contrary to Japan's complaint, as will be shown below, the USITC acted completely consistently with prior decisions in relying on the most recent trends. Quite apart

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[44] *See* Inv. No. 731-TA-807 (Final), USITC Pub. No. 3202 (June 1999) at 16 (hereinafter "USITC Views") **(US/C-1)**.

[45] *See Cold-Rolled Steel Report* at 24 **(US/A-3)**.

[46] *See* USITC Views at 11, 15, 18, 19 **(US/C-1)**.

[47] *See Cold-Rolled Steel Report* at 23 **(US/A-3)**.

from the inaccuracies of Japan's portrayal of the USITC decision, however, the report shows that the Commissioners did not choose to rely on such trends as a pretext in order, as Japan alleges, to "create some rational basis for its decision."[48] As Japan points out, Commissioner Crawford's analysis did not rely on such trends. Yet she reached an affirmative injury determination.

40. Commissioner Askey, who found that three-year trends did not support a present injury determination, found the accelerating trends of imports at the end of the period established a threat of material injury. In short, no manipulation of the facts was needed in this case in order to reach an affirmative determination. The Commissioners found that result to be required by the facts regardless of the method they used for examining the evidence.

### G. The "Economic Context" of the Investigation

41. Japan's demonstrably false accusations that the USITC ignored such factors as minimill competition and the GM strike, as well as the growth in U.S. demand, amount to an attempt to distract the Panel from the clear demonstration of the adverse effects of the dramatic increase in dumped imports on the U.S. industry. Although the USITC's findings will be discussed more thoroughly below, a brief summary here is a necessary corrective to the thoroughly unobjective view that Japan offers. Although Japan makes much of the U.S. steel industry's efforts to publicize its sense of crisis due to the increasing levels of dumped imports, the USITC's findings show that, by quite objective measures, that sense of crisis was not misplaced.

42. U.S. imports of hot-rolled flat products from Japan surged. They increased by 419.8 percent from 1996 to 1998 and 132 percent from 1997 to 1998 alone.[49] This rise was not simply in keeping with the rise in consumption in the United States. The dumped imports' share of U.S. sales and consumption also surged. Their share of the merchant market held by dumped imports quadrupled, rising from 5.0 percent in 1996 to 21.0 percent in 1998; their share of total consumption almost quintupled, rising from 2.0 percent to 9.3 percent.[50] While dumped imports rose, they increasingly undersold the U.S. product and shifted to the sale of more commodity grade products.[51] Both U.S. and imported prices decreased most precipitously in 1998 when the volume of dumped imports reached their greatest level.[52]

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[48] First Submission of Japan at para. 32.

[49] USITC Views at 12, *citing* record information at Table C-1 **(Exh. US/C-1)**.

[50] *Id.* (*citing* record information at Tables C-1 and C-2).

[51] *Id.* at 14-15.

[52] *Id.* at 14.

43. The USITC found that this dramatic rise in dumped imports prevented the U.S. industry from participating in the growth in demand.[53] Over the entire investigative period, domestic producers' shipments remained essentially flat. In the most recent period, from 1997 to 1998, when total U.S. consumption rose 6.0 percent, the U.S. industry's shipments *fell* by 1.0 percent.[54] The domestic producers' share of total consumption fell from 92.3 percent in 1996 to 84.8 percent in 1998, and their share of merchant market sales fell from 80.4 percent in 1996 to 65.6 percent in 1998.[55]

44. The effects of the surge in dumped imports on the U.S. industry were immediate and dramatic. The U.S. industry had increased its capacity at a rate largely commensurate with the rise in demand. Nevertheless, the USITC found that "due to the rapid increase in the volume and market share of subject imports, the domestic industry's increased capacity almost immediately became excess capacity."[56] Capacity utilization plummeted. The industry's performance experienced serious declines. Operating income fell by more than half and the ratio of operating income to net sales declined dramatically as import volumes, market share and underselling reached their peak.[57] Industry employment fell, capital expenditures declined, and two firms filed for bankruptcy.[58]

45. The USITC considered and rejected the argument that Japan makes here -- namely, that the increase in dumped imports was simply a response to a U.S. domestic shortage in 1998. The USITC found that argument simply not consistent with the conditions in the market place. The declining capacity utilization of the domestic industry and the plummeting prices of imported steel made it clear that the influx was supply-driven.[59]

46. Likewise, the USITC rejected the arguments that Japan makes here in alleging that the

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[53] *Id.* at 12.

[54] *Id.* at 13.

[55] *Id.* at 12.

[56] *Id.* at 17.

[57] *Id.* at 18.

[58] *Id.* at 18, n.101.

[59] Id. at 13.

U.S. industry had a strong performance in 1998, simply declining from a "banner year".[60] As the USITC found, in a year in which U.S. consumption reached record levels and the U.S. industry increased its productivity and lowered its costs, 1998 should have been a highly successful year for the industry. Instead, however, as the USITC's analysis demonstrates, the U.S. industry's 1998 performance deteriorated sharply, as measured by almost all performance indicators.[61] It is noteworthy that the USITC found that, as operating income for the whole industry declined significantly both for merchant market sales and overall production, those producers most exposed to import competition found their ratio of operating income to net sales declining to negative levels.[62]

47. In brief, an objective analysis of the relevant economic factors demonstrated to the USITC that dumped imports caused material injury to the U.S. industry. Japan may want the United States investigative authorities to have ignored the very real effects that dumped Japanese imports were having in the United States market. The fact that they did not do so is no evidence, however, of bias. Rather, it reflects administration of antidumping laws entirely in accordance with the Agreement. Japan's allegations of bias are simply an attempt to distract the Panel from the merits of the authorities' decisions.

## H. The Supposed Conspiracy, Reviewed

48. The only established facts of any significance are that, in response to a massive surge in imports from Japan, Commerce agreed with the U.S. industry that it was necessary to accelerate its investigation by 20 days and to make its preliminary determination on the issue of critical circumstances about two months before its preliminary determination of dumping. Japan's problem is that the real targets of its case are the Department's use of facts available and the USITC's determination of injury, and there is no evidence whatsoever that this acceleration of the investigation had any effect on the outcome of either issue.

49. Japan's answer to this problem was to attempt to construct a conspiracy in which the pervasive influence of the U.S. industry led the Department and the USITC to use unfair means to reach biased determinations. As evidence of the conspiracy, Japan offers the simple fact of the acceleration of the case itself, which was plainly in answer to its own export surge, and Secretary Daley's pledge to vigorously enforce a law that he is charged with administering. On this flimsy basis, this Panel is supposed to view the objective merits of this case with a jaundiced eye, and punish the Department and the USITC for their supposed transgressions.

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[60] First Submission of Japan at para. 34.

[61] USITC Views at 17-20 **(Exh. US/C-1)**.

[62] *Id.* at 19.

## I. The "International Ramifications" of the Proceeding

50. In a final flourish, Japan broadly hints to the Panel that, given the widespread use of antidumping measures among WTO Member States, it should "discipline" their application to make them less effective.[63] Japan asks the Panel members to keep in mind that U.S. Federal Reserve Chairman Greenspan evidently would prefer an antidumping regime that addresses only sales made below marginal cost (rather than average cost).[64] The "international ramifications" of this little reminder are plain. Since "right thinking" people do not agree with the Agreement negotiated by the WTO Member States, this Panel should interpret the Agreement so that the results permitted are those of which such "right thinking" people would approve - - minimal, if any, antidumping measures.

51. This is a blatant call for the Panel to do whatever it can to eviscerate the Agreement, rather than to follow its clear mandate to enforce only those restrictions on the application of antidumping measures to which the WTO Member States have agreed. It is well-known that Japan opposes *any* application of antidumping measures. As Japan knows (or should know), however, this Panel's proper role is to apply the Agreement *as agreed* between the Member States, not to interpret the Agreement as the Japanese Government would have preferred to see it.

52. To provide nominal legal cover for this effort, Japan raises once again the long-discredited notion that the Agreement is an "exception" to the liberal trade principles of the WTO Agreements, and so should be subject to special scrutiny. The Panel should reject this notion. The Appellate Body has made clear that the status of a provision as a so-called exception: (1) does not shift the burden of proof (*Wool Shirts*[65] and *Hormones*[66]); and (2) does not warrant a different approach to interpreting the provisions (*Hormones*). As the Appellate Body said in *Hormones*:

> The general rule in a dispute settlement proceeding requiring a complaining party to establish a *prima facie* case of inconsistency with a provision of the *SPS Agreement* before the burden of showing consistency with that provision is taken on by the

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[63] *Id.* at para. 44.

[64] *Id.* at para. 43, n. 49.

[65] *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India,* WT/DS33/AB/R, at 16.

[66] *EC - Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, Report of the Appellate Body adopted 13 February 1998, para. 104.

> defending party, is *not* avoided by simply describing that same provision as an "exception." In much the same way, merely characterizing a treaty provision as an "exception" does not by itself justify a "stricter" or "narrower" interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation.[67]

53. Antidumping measures do not constitute exceptions from the rest of the WTO framework. They are subject to the same rules of interpretation as any other provision of the other WTO Agreements, except in that they enjoy a more deferential standard of review. Therefore, the Panel should reject Japan's suggestion that this discredited notion should serve as cover for eviscerating the Agreement.

### J. Conclusion

54. The Panel should reject in the most unequivocal terms possible Japan's unseemly efforts to taint this Panel's deliberations by unfounded allegations of bias, and should decide each of the issues strictly upon its merits under the Agreement.

## II. Preliminary Objections

55. The United States has two preliminary objections. First, Japan improperly asks the Panel to examine extra-record testimony and evidence which has only now been submitted to the Panel and which was not made available to the investigating authorities during the course of the anti-dumping investigation. Second, Japan's first submission asks the Panel to examine claims which are outside the Panel's terms of reference -- *i.e.*, that were not set forth in Japan's request for the establishment of a panel.[68] The United States objects to both of these actions by Japan and requests that the Panel rule on these preliminary objections at or before its first meeting with the parties, and that the Panel disregard the extra-record testimony and evidence and decline to examine the claim in question.

### A. The Panel May Not Consider Extra-Record Post-Investigation Evidence

56. Japan seeks to have the Panel review post-investigation testimony and evidence which

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[67] *Id.* at para. 104.

[68] *United States–Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, Request for the Establishmnent of a Panel* (Feb. 11, 2000) (hereinafter "*Panel Request*") **(Exh. US/A-1)**.

was not originally made available to the Department or the USITC. Under the Anti-dumping Agreement, a panel examines the decisions of the investigating authorities in light of the facts available to it – and not new facts revealed for the first time to the panel. The Panel should therefore disregard this extra-record evidence.

### 1. Article 17.5(ii) of the Anti-Dumping Agreement Limits the Panel's Review

57. Article 17.5 of the Agreement provides that the Panel shall examine the matter based upon:

> (ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member.

58. This provision directs the Panel to limit its review to the "facts made available" that were before the Department when it made its determination (*i.e.*, the evidence contained in the administrative record).[69] The panel in *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup from the United States*, WT/DS132/R, Report of the Panel issued 14 January 2000 (hereinafter "*HFCS*") stressed this point, stating:

> {W}e are required to consider this dispute on the basis of the facts before the investigating authority, pursuant to Article 17.5(ii) of the AD Agreement.[70]

And,

> Mindful of the standard of review and Article 17.5(ii), we note that we may consider in our examination of this issue only what was actually available to the investigating authority at the time . . . .[71] (Emphasis added).

59. The *HFCS* panel also stated:

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[69] The administrative record is the information presented during the investigation, in accordance with Article 17.5(ii) of the Anti-Dumping Agreement. The "appropriate domestic procedures" of the United States investigating authorities -- the Department and the USITC -- are detailed in 19 U.S.C. §1516a(b)(2)(A), which states that the record consists of all information "presented to or obtained by ... the administering authority ... during the course of the administrative proceeding, ...; and a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register."

[70] *HFCS* at para. 7.43.

[71] *HFCS* at para. 7.105.

> Our approach in this dispute will similarly be to examine whether the evidence before SECOFI at the time . . . was such that an unbiased and objective investigating authority evaluating that evidence, could properly have determined that sufficient evidence of dumping, injury, and causal link existed . . . . We . . . also take into account information that was before SECOFI at the time of its determination . . . .[72] (Emphasis added).

60. Likewise, in describing the panel's role, the panel in the *Wool Shirts* case stated in part:

> {P}anels do not reinvestigate the market situation but rather limit themselves to the evidence used by the importing Member in making its determination to impose the measure. In addition, such {} panels . . . do not consider developments subsequent to the initial determination. In respect of the US determination at issue in the present case, we consider, therefore, that this Panel is requested to make an objective assessment as to whether the United States respected the requirements of {Article 17.5(ii)} at the time of the determination.[73] (Emphasis added).

61. Similarly, the Panel in the *Korean Dairy Products* case stated:

> {W}e consider that the Panel should examine the analysis performed by the national authorities at the time of the investigation on the basis of the various national authorities' determinations and the evidence it had collected.[74] (Emphasis added).

### 2. The Panel Must Disregard Japan's Four Affidavits

62. Japan has included affidavits by the American attorneys for NSC,[75] NKK,[76] and KSC,[77] as

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[72] *HFCS* at para. 7.95.

[73] *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India (United States -- Shirts and Blouses)*, WT/DS33/R, Report of the Panel, as modified by the Appellate Body, adopted 23 May 1997, para. 7.21. (This case involved the Agreement on Textiles and Clothing; however, the language of Article 17.5(ii) is substantially the same as the corresponding ATC language.)

[74] *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, Report of the Panel adopted 21 June 1999, WT/DS98/R, para. 7.30.

[75] Affidavit of Daniel J. Plaine, Counsel to NSC **(Exh. JP-46)**.

[76] Affidavit of Daniel L. Porter **(Exh. JP-28)**.

[77] Affidavit of Robert H. Huey, Counsel to KSC **(Exh. JP-44)**.

well as one by statisticians hired by the counsel for NKK,[78] with their first submission. These represent sworn testimony by attorneys and experts which was not presented to the Department during the investigation and therefore not made part of its administrative record. Consistent with Article 17.5(ii), the Panel may not base its review on any of this evidence.

63. These affidavits contain egregious and belated attempts to supplement the Department's administrative record, and should be dismissed *in toto*. For example, Mr. Plaine testifies that the Department's use of facts available was improper based in part on unspecified conversations with unnamed Department officials.[79] Mr. Porter also relies on undocumented personal conversations with Department officials to substantiate his testimony.[80] It is not clear that such conversations ever took place. Even if they did, the substance of these conversations is not part of the administrative record and therefore should not be before the Panel. Furthermore, Mr. Porter explicitly acknowledges that the information he is urging the Panel to consider is not part of the record.[81] Mr. Huey arranged for a post-determination margin analysis based on different assumptions, and based on his firm's computer program runs, for comparison with the Department's final margin results.[82] Since this inappropriate analysis is obviously not part of the record before the Panel, it must be considered new evidence and excluded. Finally, the statisticians could just as well have engaged in their discussion regarding appropriate statistical methodologies during Commerce's investigation. At that time, their testimony would have gone on the administrative record for Commerce to analyze and petitioners to rebut. They did not do so. Again, the Panel must disregard their belated appraisal.

64. Further, the Panel's mission under Article 17.6(i) is to determine whether the establishment of the facts was proper and its evaluation of those facts unbiased and objective. If no violation is alleged concerning the way in which interested parties were able to present evidence and argument, then the only question is whether the authorities' evaluation of the evidence and argument before them was unbiased and objective. Presenting new testimony that was not before the authority seeks to have the Panel go beyond its assigned task.

65. The policy that an authority's final determination will be evaluated only in terms of the arguments and facts that were presented to it during its investigation is also embodied in Article 12.2.2's description of what the authority's public report will contain. The report is to contain

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[78] Affidavit and Resumes of Edward J. Heiden and John Pisarkiewicz, Statisticians **(Exh. JP-56)**.

[79] Affidavit of Daniel J. Plaine, Counsel to NSC at para. 11 **(Exh. JP-46)**.

[80] Affidavit of Daniel L. Porter at paras. 10, 14, 28 **(Exh. JP-28)**.

[81] *See id.* at para. 23 (discussing matters which did not form part of the NKK Sales Verification Report).

[82] Affidavit of Robert H. Huey, Counsel to KSC at paras. 5-7 **(Exh. JP-44)**.

"the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers." If the exporters or importers did not make some argument or claim, that cannot be taken as a basis for finding that the authority did not evaluate the evidence and argument before them on an unbiased and objective basis. Thus, the Panel should not allow exporters or importers to try to impugn the authority's decision by new argument.

66. Finally, for the Panel to consider this new testimony is to undermine the guarantees of the Anti-Dumping Agreement. The Agreement guarantees to interested parties rights of participation and response. Article 6.1 guarantees that all interested parties will have ample opportunity to present in writing all evidence which they consider relevant. The Panel, whose proceedings are confidential and in which only Members are parties, cannot provide that assurance. Under Article 6.2,

> Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defense of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered.

Since DSB proceedings do not offer non-Member interested parties these rights, to allow some interested parties to present argument to the Panel undermines the due process rights afforded by the Anti-Dumping Agreement. By admitting such presentation, the Panel will be undermining the stated purposes of the DSB of "providing security and predictability to the multilateral system" and to "preserve the rights and obligations of Members under the covered agreements."[83]

67. In sum, Japan, with these affidavits, is trying not only to bolster its arguments with assistance from attorneys in the United States, but also to allow its steel companies, through their American lawyers, to fabricate extra-record post-investigation evidence and present it to the Panel as if they were legitimate parties to the dispute. The Panel may not allow it and must confine its scope to the evidence relied upon by the Department in order to determine whether the determinations were permissible under the Anti-Dumping Agreement.

### 3. The Panel Must Disregard Japan's Newspaper Articles

68. The Government of Japan's written submission relies upon numerous pieces of alleged evidence concerning the state of the U.S. industry which were not part of the original record before Commerce or the USITC, and, accordingly, these pieces of extra-record evidence should not be allowed to be used in support of Japan's arguments before this panel. Article 6.1 of the Antidumping Agreement provides that interested parties should be given "ample opportunity to

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[83] *See* DSU Article 3.2.

present in writing all evidence which they consider relevant in respect of the investigation in question." Japan does not, and indeed cannot, allege that the United States violated this obligation. Japanese respondents were given ample opportunity to put information on the record during the course of the investigation, and they availed themselves of this opportunity. The extra-record evidence that Japan now proffers goes to issues that were before the investigating authorities in the proceedings below. For example, the evidence pertains to the political climate in the United States resulting from the surge of Japanese imports,[84] the consumption of hot rolled steel in the United States,[85] the performance of minimills,[86] and pricing of hot rolled steel in the U.S. market.[87] If the Japanese respondents understood these pieces of evidence to be more probative of these issues than the evidence which they had already put before the agencies and the evidence that their staffs had collected, then they should have offered them as exhibits in the course of the proceedings as well. Likewise, had they wished to engage either investigating authority in an academic discussion of the merits of the anti-dumping law, they could also have submitted such articles or treatises in the course of the proceedings.[88] They did not, and this Panel now should refuse to consider all of these pieces of information.

### B. The Panel Must Find that Japan's Improper Facts Available Claim Is Outside the Panel's Terms of Reference

69. The Panel must dismiss Japan's challenge to the Commerce Department's facts available

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[84] First Submission of Japan at n.32 (*citing* Nancy E. Kelly, "*House Steel Import Vote Sends Message*," American Metal Market, at 2 (Oct. 19 1998)**(Exh. JP-27)**).

[85] First Submission of Japan at n.38 (*citing* a Graph of Hot-Rolled Industry Composite - Profit From Operations **(Exh. JP-33)**; and *World Bank Annual Report 1999* **(Exh. JP-33)**); *see also* First Submission of Japan at n.267 mentioning the *Preston Pipe & Tube Report* (Nov. 1998) and *Preston Pipe and Tube Report* (Sept. 1998) **(Exh. JP-67)**, and articles regarding U.S. mills' purchases of semi-finished steel **(Exh. JP-32)**).

[86] First Submission of Japan at n.40 citing PaineWebber, "*Steel: A Gauntlet for All, Rewards for the Select*," Steel Strategist #24 at 117 (June 1998) and Charles Yost, "Thin Slab Casting/Flat-Rolling: New Technology to Benefit U.S. Steel Industry," in United States International Trade Commission, *Industry Trade and Technology Review*, 1996 ITC Lexis 428, *52, *65, Table 1 (Oct. 1996) (Exh. JP-34); *see also* First Submission of Japan at n.42 (*citing* Donald Barnett and Robert Crandall, "Steel: Decline and Renewal," in *Industry Studies* (2nd ed. Larry Duetsch, ed. 1998)**(Exh. JP-35)**).

[87] First Submission of Japan at n.46 (*citing* Transaction Pricing Service, *Purchasing Magazine* **(Exh. JP-36)**).

[88] First Submission of Japan at n.49 (*citing* Greenspan remarks (Exh. JP-37); and n. 50 *citing* trade protection treatises **(Exh. JP-38)**). Similarly, the series of press articles which Japan has included at exhibits 16-23 and 25-26 and cited in the introduction of its First Submission, represents a further potpourri of extra-record material, selectively chosen to advance Japan's arguments. This Panel must reject Japan's attempts to draw it and the parties in this case into a battle of extra-record newspaper clippings.

practice[89] as outside the Panel's terms of reference. Japan was *very* clear in its panel request that it was asking the Panel to examine the Department's determination "in its application of 'facts available'" specifically to KSC, NSC, and NKK corporations. The panel's terms of reference are "to examine ... the matter referred to by the DSB in [its panel request]."[90] Since Japan never referred the Department's general practice of facts available, which is based on the United States statute, to the DSB, but only referred the specific application to these companies, this general practice is outside the Panel's terms of reference.

70. The United States notes that, where Japan wanted the Panel to examine the law or a general practice on its face, Japan's panel request made that request specific. Japan was careful to specify that it was challenging the United States' statute in the claims pertaining to Commerce's all others rate and critical circumstances statutory provisions, as well as the Commission's captive production statutory provision.[91] Plainly, Japan's panel request did not include a similar reference to the Department's "general practice" concerning facts available.

71. Yet, in its first submission, Japan has two sections specifically, and appropriately, entitled "In Applying Adverse Facts Available to [KSC, NSC, or NKK], USDOC Violated ...," but has a third, separate section, entitled "USDOC's Established Practice of Applying Adverse Facts Available To Punish Respondents Is Inconsistent With Article 6.8 and Annex II of the Anti-dumping Agreement." This latter section, and the previous "background" section, contain numerous citations to investigations that were not the subject of any consultations and which were not referred to the DSB in Japan's panel request. This is not a matter that this Panel should examine under its terms of reference.

72. The only possible way in which Japan might try to justify including the U.S. law and general practice as to facts available in its first submission is that, in the panel request, Japan

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[89] *See* First Submission of Japan at 19-21.

[90] The Panel's scope of authority is governed by Article 7 of the Dispute Settlement Understanding ("DSU"), regarding the terms of reference of panels. That provision authorizes panels to examine the "matter" referred to them by the DSB.

[91] *Panel Request* at 4 and 5, paras. A-3, A-5, and B-2. In each of these three instances, Japan stated: "In addition, section .... of the Tariff Act of 1930, as amended ... is inconsistent with" the pertinent provision of the Agreement concerning the three issues for which Japan challenged U.S. statutory provisions – all others rate, critical circumstances, and captive production. This additional "In addition" paragraph is notably absent from Japan's facts available claim, set forth at paragraph A-2 of its panel request. It is likewise absent from Japan's other claims – affiliated companies (A-1) and injury (B-1) for which Japan has not included challenges to United States' statutory provisions or general practice.

included a very broad and ambiguous count of conformity.[92] This stated that the United States contravened Article XVI:4 of the Marrakesh Agreement and Article 18.4 of the Anti-Dumping Agreement. In the section of its brief challenging Commerce's general facts available practice, Japan cites these provisions as justifications.[93] These provisions, however, do not specify claims. Article XVI:4 of the Marrakesh Agreement states:

> Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

Nothing in that article indicates that it may be used as a means to challenge a specific practice which was not mentioned in the panel request. Similarly, Article 18.4 merely states,

> Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question.

Again, nothing in that article suggests that it may authorize a challenge to a specific practice not mentioned in the panel request. If Japan wanted to challenge the Department's general facts available practice under this provision, it should have cited the practice specifically in the panel request. In fact, its failure to do so has prejudiced the United States, which could have sought the participation of other Members as third parties, which also use adverse inferences in their facts available practices, had the United States known, when it received Japan's panel request, that the challenge involved so much more than mere company-specific claims.

73. The Appellate Body examined this issue in *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, Report of the Appellate Body issued 14 December 1999 (hereinafter "*Korean Dairy Products AB Report*"), stating:

> Indeed, any claim that is not asserted in the request for the establishment of a panel may not be submitted at any time after submission and acceptance of that request.[94]

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[92] *Panel Request* at 5, para. E **(Exh. US/A-1)**.

[93] First Submission of Japan at para. 60 and n.58.

[94] *Korean Dairy Products AB Report* at para. 139.

74. Finally, the Appellate Body faced this general issue in *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, Report of the Appellate Body decided 2 November 1998 (hereinafter "*Mexican Cement*"). There, the Appellate Body found:

> "The matter referred to the DSB" for the purposes of Article 7 of the DSU and Article 17.4 of the Anti-Dumping Agreement must be the "matter" identified in the request for the establishment of a panel under Article 6.2 of the DSU. That provision requires the complaining Member, in a panel request, to "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.[95]

75. The Appellate Body emphasized this point, stating:

> Where a complaining Member wishes to make any claims concerning an action taken, or not taken, in the course of an anti-dumping investigation under the provisions of the Anti-Dumping Agreement, Article 6.2 of the DSU requires "the specific measures at issue" to be identified in the panel request.[96]

76. In sum, Japan's apparent attempt to hide its unexpected general attack on Commerce's facts available practice behind Article 18.4 of the Anti-Dumping Agreement and Article XVI:4 of the Marrakesh Agreement must fail. The Panel must therefore reject as outside its terms of reference Japan's challenge to the United States' facts available practice generally.

## III. Standard of Review

### A. Standard of Review

77. The Anti-dumping Agreement is unique among the WTO agreements in providing its own standard for a WTO panel's review of an anti-dumping determination by an investigating authority.[97] That standard is set forth in Article 17.6 in two parts: the first concerns review of

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[95] *Mexican Cement* at para. 72 (emphasis in original), reversed on other grounds before the Appellate Body.

[96] *Id.* at para. 77 (emphasis added).

[97] The Ministerial Declaration on AD/CVD Dispute Settlement also applies the standard of review set forth in Article 17.6 of the AD Agreement to matters pertaining to subsidies and countervailing measures, in view of

questions of fact and the second concerns review of issues of law. In its brief, Japan acknowledges this concept.[98] However, in discussing the pertinent provisions of the Agreement dealing with these standards, Japan omits critical phrases, thereby distorting the standard of review which this Panel is to apply. The proper standard is that described below.

### 1. Review of an authority's establishment and assessment of the facts: Panels may not engage in *de novo* review

78. Article 17.6(i) of the AD Agreement provides that:

> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, *even though the panel might have reached a different conclusion, the evaluation shall not be overturned.* (Emphasis added.)

79. In other words, the panel may not conduct its own *de novo* evaluation of the facts if the authority's establishment of the facts is proper and if its evaluation of the facts is unbiased and objective. This applies even if the panel -- had it stood in the shoes of that authority originally -- might have decided the matter differently. Japan ignores this last concept, by omitting the critical phrase -- "even though the panel might have reached a different conclusion" -- from its quotation of Article 17.6(i).[99] Omission of this phrase distorts a core principle of this provision -- that panels should not re-evaluate the relative weight which the domestic fact-finder, in its discretion, decides to accord to particular pieces of evidence.[100] After all, the investigating authority is the entity which gathers, hears, and weighs the evidence in the first place; its evaluation deserves deference.

80. Moreover, it is well-established that panel review is not a substitute for proceedings conducted by national investigating authorities. Numerous panels have recognized that the role of panels is not to conduct a *de novo* review of the factual findings of a national investigating

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"the need for consistent resolution of disputes arising from anti-dumping and countervailing duty measures."

[98] First Submission of Japan at para. 47.

[99] *Id.* para. 48.

[100] Japan apparently believes that this phrase is irrelevant because it intends to prove that all of the Commission's and Commerce's factual determinations were improper, biased, and non-objective. *Id.* at para. 49. It errs, as the remainder of this brief demonstrates.

authority. For example, in *HFCS*,[101] adopted earlier this year, the WTO panel stated that when reviewing an antidumping determination, a panel's proper role is to examine whether the evidence before the investigating authority was such that an unbiased and objective investigating authority evaluating that evidence could properly have made the same determination. In its reasoning, the panel quoted the following language from an earlier decision:

> [T]he Panel was not to conduct a *de novo* review of the evidence relied upon by the United States authorities or otherwise to substitute its judgment as to the sufficiency of the particular evidence considered by the United States authorities.[102]

81. Therefore, in interpreting subparagraph (i) as to factual determinations, Article 17.6 makes clear that the matter before the Panel is not whether there was injury or dumping, but rather whether the investigating authority properly established the facts and evaluated them in an unbiased and objective way. Article 17.6 further makes clear that a Panel does not conduct the required assessment of that question if it evaluates what findings it would make if presented with the same evidence.

82. In addition to establishing the standard of review for factual issues, the AD Agreement also establishes the "scope" of that review. Specifically, Article 17.5(ii) of the AD Agreement directs the Panel to limit its review to the facts that were before the investigating authority when it made its determination (*i.e.*, the evidence contained in the administrative record).[103] This concept is consistent with the fact that the Panel may not act as a trier-of-fact in the first instance. In its first submission, Japan has ignored this principle by attaching extra-record evidence,

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[101] *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R (Jan. 28, 2000) at paras. 7.94 - 7.95. In its discussion, the *HFCS* panel quoted from the panel report in *Guatemala – Anti-Dumping Investigation Regarding Portland Cement From Mexico*, WT/DS60/R (June 19, 1998) at paras. 7.54 - 7.57. Moreover, the *HFCS* panel noted that, while the Appellate Body reversed the *Guatemala - Cement* panel report on other grounds, the *HFCS* panel noted that the *Guatemala - Cement* panel report set out a standard of review that was "instructive." *See HFCS*, at para. 7.94.

[102] The quoted language is actually taken from *United States – Measures affecting Import of Softwood Lumber from Canada*, SCM/162, BISD40S/358, adopted 27-28 October 1993, at para. 335, as quoted in *Guatemala – Cement* at para. 7.56. In fact, the *Guatemala – Cement* panel, in a section of its report quoted in *HFCS*, stated that "We believe that the approach taken by the Panel in the *Softwood Lumber* dispute is a sensible one and *is consistent with the standard of review under Article 17.6(i).*" *See HFCS* at para. 7.94 (quoting *Guatemala – Cement* at para. 7.57). *See also United States – Anti-dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea*, WT/DS99/R, para. 4.443 (29 January 1999)(refusing to perform a *de novo* review of evidence before the U.S. Commerce Department with regard to an econometric study which Commerce determined was based on unrealistic assumptions and contradictory evidence).

[103] *See HFCS*, para. 7.43 ("[W]e are required to consider this dispute on the basis of the facts before the investigating authority, pursuant to Article 17.5(ii) of the AD Agreement.").

including affidavits from U.S. attorneys for certain Japanese steel mills. We have objected to these affidavits and other extra-record evidence in our Preliminary Objections, above.

### 2. Review of an authority's interpretation of the Agreement: Panels must respect multiple, permissible interpretations

83. In reviewing legal questions that turn on the proper meaning to be ascribed to the Anti-dumping Agreement, subparagraph (ii) of Article 17.6 provides that, where a relevant provision of the Agreement is subject to more than one permissible interpretation, a WTO panel shall find the Anti-dumping measure in question to be in conformity with the Agreement if it is based on any of those permissible interpretations. Japan ignores this concept, by omitting the second sentence of Article 17.6(ii).[104] That provision, quoted in full, states as follows:

> the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. *Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.* (Emphasis added.)

84. The negotiators of the Antidumping Agreement, uniquely among negotiators of the WTO Agreements, saw fit to make specific provision for the possibility that customary rules of interpretation would not resolve disputes concerning the meaning of the Anti-dumping Agreement. This very fact provides context for the interpretation of that Agreement. It reflects the negotiators' understanding that they had left a sufficient number of issues ambiguous such that they needed to make special provision for cases in which customary rules would not provide an unequivocal result. The drafters of the Agreement wisely recognized that they could not possibly foresee, and write rules for, the precise methodology to be applied to every issue that would arise in the conduct of highly technical and complex anti-dumping proceedings. Equally wisely, they understood that, with regard to many of these complex issues, national authorities already did things differently, and that the Agreement should allow sufficient flexibility for authorities to continue such variations on the anti-dumping theme.

85. In fact, Article 17.6(ii) reflects a deliberate choice by the negotiators to allow for multiple interpretations. In this sense, Article 17.6(ii) constitutes an admonition to panels to take special care, as reflected in Articles 3.2 and 19.2 of the DSU, not to add to the obligations of Members. The reference to "customary rules of interpretation of public international law" is not specific. While we may presume that it refers to the Vienna Convention, the panel may not apply the Convention in a manner which renders any of the express language of the Agreement a nullity. Thus, Japan's contention that Articles 31 and 32 of the Convention require or even permit a panel to choose one interpretation of ambiguous language in the Agreement as the only

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[104] First Submission of Japan at para. 50.

interpretation,[105] renders a nullity the second sentence of Article 17.6(ii) of the Agreement. That sentence expressly acknowledges that the drafters of the Agreement were aware that they had fashioned language that allowed of more than one permissible interpretation, and they expressly directed that panels were not to resolve such ambiguities in favor of only one interpretation.

86. Moreover, in interpreting subparagraph (ii) as to legal questions, the Panel should take note of Article 31(3) of the Vienna Convention on the Law of Treaties, which specifically provides that, in interpreting international agreements:

> There shall be taken into account, together with the context: . . .
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

Thus, where the Anti-dumping Agreement is ambiguous or silent with respect to a particular methodology, but that methodology has been subsequently adopted as standard practice by a number of signatories to the Agreement, the practice of those parties must be taken into account, with regard to determining whether that methodology constitutes a "permissible interpretation" of the Agreement. For example, the practice of countries with regard to the arm's-length test under Article 2 of the Agreement, discussed below, varies: some countries exclude all sales to affiliated parties, and some countries, like the United States, use them if they pass a certain test. This practice may be taken into account by the Panel in determining whether the practice of the United States -- at issue in this particular case -- is consistent with the Agreement. The varying practices of other countries may likewise suggest that there are, in fact, multiple permissible interpretations of this provision of the Agreement.[106]

87. In sum, Article 17.6(ii) makes clear that a Panel fails to make the required assessment of

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[105] First Submission of Japan at para. 50 and n.51. Japan cites "two noted scholars" for its contention that there can be only one permissible interpretation of an Anti-dumping Agreement provision. *Id.* (*citing* Steven P. Croley and John H. Jackson, *WTO Dispute Procedures: Standard of Review, and Deference to National Governments*, 90 Am. J. Int'l L. 192, 201 (1996)). However, even Jackson and Croley recognize that the second prong of Article 17.6(ii) uses terms nearly identical to those of U.S. administrative law, which allows for multiple, permissible interpretations of a statutory provision which is silent or ambiguous on a specific point. *See* Croley and Jackson, 90 Am. J. Int'l L. at 203-204.

[106] *See also New Zealand - Electrical Transformers from Finland*, GATT Doc. L/5814 - 32S/55 (18 July 1985), para. 4.3, where a Panel noted with regard to the anti-dumping methodology used by New Zealand in calculating cost-of-production:

> Article VI did not contain any specific guidelines for the calculation of cost-of-production and {the Panel} considered that the method used in this particular case appeared to be a reasonable one. In view of this and having noted the arguments put forward by both sides as regards the costing of certain inputs used in the manufacture of the transformers, the Panel considered that there was no basis on which to disagree with the New Zealand authorities' finding of dumping .

the applicability or conformity of an authority's action with the Anti-dumping Agreement when, if the terms of the Agreement admit of multiple permissible interpretations, a Panel decides that an authority's action fails to conform with the Anti-dumping Agreement when it conforms to one of those interpretations. Thus, the relevant question in every case is not whether the challenged determination rests upon the best or the "correct" interpretation of the Anti-dumping Agreement, but whether it rests upon a "permissible interpretation" (of which there may be many). Moreover, in determining whether an interpretation is permissible, the Panel should take into account the subsequent practice of signatories to the Anti-dumping Agreement. If the challenged determination does in fact rest upon a permissible interpretation, then this Panel must uphold the determination.

### 3. Japan's Argument Concerning the Standard of Review under Article X:3 is Irrelevant

88. Finally, Japan contends that its GATT Article X:3 claims are not covered by the deferential standard of review in the Anti-dumping Agreement.[107] This argument is simply not relevant. As demonstrated below, Japan is complaining about actions that are authorized as reasonable and unbiased under the Anti-Dumping Agreement, and are reviewed under the deferential standard of review of Article 17.6. These same actions cannot be found to be inconsistent with Article X:3.

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[107] First Submission of Japan at para. 52. Since GATT Article X:3 is outside the Anti-dumping Agreement, Japan's argument is that the general standard of review provision of Article 11 of the Dispute Settlement Understanding governs the Article X:3 claims.

## PART B: ANTI-DUMPING MARGINS AND CRITICAL CIRCUMSTANCES (PUBLIC VERSION, CONTAINS NO BCI)

## FACTUAL BACKGROUND

### I. The Course of the Proceeding

1. On September 30, 1998, the Department of Commerce received an antidumping petition from a group of domestic steel producers alleging that hot-rolled steel from Japan and other countries was being dumped in the United States, and was thereby injuring a U.S. industry.[1] In addition to alleging injurious dumping the petition provided information demonstrating reasonable grounds to believe or suspect that sales in Japan were made at prices below the fully allocated cost of production ("COP").[2] The petition also alleged that critical circumstances existed as to imports from Japan, and supported the elements required for a finding of critical circumstances with information readily available.[3]

2. On October 7, 1998, the USITC initiated its investigation of hot-rolled steel from Brazil, Japan and Russia.[4] Based on an examination of the information presented in the petition, the Department published, on October 22, 1998, its notice of initiation of the antidumping investigation at issue.[5] At the same time, Commerce initiated country-wide cost and critical circumstances investigations with respect to Japanese hot-rolled steel.[6] In accordance with its newly adopted policy,[7] Commerce stated that it would make a critical circumstances determination "as soon as practicable."[8]

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[1] *Initiation of Antidumping Duty Investigation: Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil, Japan, and the Russian Federation (hereinafter "Commerce Initiation Notice")*, 63 Fed. Reg. 56607, 56607 (October 22, 1998) **(Exh. JP-6)**.

[2] *Id.* at 56610, 56612.

[3] *Id.* at 56612-13.

[4] *Certain Hot-Rolled Steel Products From Brazil, Japan, and Russia*, 63 Fed. Reg. 53926 (October 7, 1998) **(Exh. JP-2)**.

[5] *Commerce Initiation Notice* at 63 Fed. Reg. at 56607, 56613 **(Exh. JP-6)**.

[6] *Id.* at 56612-13.

[7] *See Change in Policy Regarding Timing of Issuance of Critical Circumstances Determinations*, 63 Fed. Reg. 55364, 55364 (October 15, 1998) **(Exh. JP-3)**.

[8] *Commerce Initiation Notice*, 63 Fed. Reg. at 56613 **(Exh. JP-6)**.

3. On October 19, 1998, Commerce issued Section A of its antidumping questionnaire to the six Japanese steel producers identified in the petition.[9]

4. Based on production-volume information received from these six producers, and because it was not practicable for the Department to examine all the Japanese producers fully, Commerce selected Nippon Steel Corporation ("NSC"), NKK Corporation ("NKK") and Kawasaki Steel Corporation ("KSC") as respondents on October 30, 1998, and advised the remaining companies that they were excused from responding to Section A.[10] On the same day, Commerce issued sections B-E of its antidumping questionnaire to NSC, NKK and KSC.[11]

5. On November 16, the USITC notified the Department of its affirmative preliminary finding of threat of material injury in this case.[12] On November 30, 1998, Commerce published its affirmative preliminary critical circumstances determination.[13]

6. The Department issued its Preliminary Determination of Sales at Less Than Fair Value ("LTFV Preliminary Determination") on February 12, 1999.[14] The dumping margins reflected in the LTFV Preliminary Determination were: NSC, 25.14 percent; NKK, 30.63 percent; KSC, 67.59 percent; "All Others," 35.06 percent.[15] The "all others" margin was the weighted average

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[9] *Cf. Id.*, 63 Fed. Reg. at 56610 *with Notice of Preliminary Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan* (hereinafter "*LTFV Preliminary Determination*"), 64 Fed. Reg. 8291, 8292 (February 19, 1999) **(Exh. JP-11)**.

[10] *Id.*

[11] *Id.*

[12] *Id.*; *Certain Hot-Rolled Steel Products From Brazil, Japan and Russia*, 63 Fed. Reg. 65221 (November 25, 1998) **(Exh. JP-7)**.

[13] *Preliminary Determination of Critical Circumstances: Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan and the Russian Federation* ("*Critical Circumstances PreliminaryDetermination*"), 63 Fed. Reg. 65750, 65751 (November 30, 1968) **(Exh. JP-9)**.

[14] *LTFV Preliminary Determination*, 64 Fed. Reg. 8291 **(Exh. JP-11)**.

[15] *Id.* at 8299.

of the margins calculated for NSC, NKK and KSC.[16] Three days later, on February 22, 1999, NSC and NKK untimely submitted weight-conversion factors.[17]

7. Once the LTFV Preliminary Determination was published, the Department, pursuant to its earlier preliminary critical circumstances finding, ordered suspension of liquidation for entries made 90 days prior to the February 19, 1999 publication of the preliminary determination of sales at less than fair value.[18]

8. During February and March of 1999, Commerce conducted sales and cost verifications of NSC's, NKK's and KSC's responses to the antidumping questionnaires.[19] On March 26, 1999, Commerce issued verification reports for all three responding companies.[20] On April 12, 1999, Commerce returned the untimely submissions containing the conversion factors and their supporting data.[21]

9. Petitioners and respondents submitted case and rebuttal briefs on April 12 and April 19, respectively, and a public hearing was held on April 21, 1999.[22]

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[16] *Id.*

[17] *See* NSC Letter resubmitting redacted versions of submissions containing untimely new information on the weight-conversion factor (April 14, 1999), at 6 of the redacted February 22, 1999 submission **(excerpts at Exh. US/B-1)**,; *see also* NKK Letter resubmitting redacted versions of submissions containing untimely new information on the weight-conversion factor (April 19, 1999), at 4-8 of the redacted February 22, 1999 submission **(excerpts at Exh. US/B-2)**. NSC and NKK submitted additional untimely conversion-factor data on March 1 and March 4, 1999, respectively. *See* NSC Letter (April 14, 1999), at 3 and Exh. 8 of the redacted March 1, 1999, submission **(excerpts at Exh. US/B-1)** and NKK Letter (April 19, 1999), at the redacted March 4, 1999 submission **(excerpts at Exh. US/B-2)**.

[18] *LTFV Preliminary Determination, 64 Fed Reg.* at 8299 **(JP-11)**.

[19] *Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan* ("*LTFV Final Determination*"), 64 Fed. Reg. 24329, 24330 (May 6, 1999) **(Exh. JP-12)**.

[20] *Id.*

[21] Letter from Program Manager to NSC rejecting NSC factor information, at 3 (April 12, 1999) **(Exh. US/B-3(a))**; Letter from Program Manager to NKK rejecting NKK factor information at 3 (April 12, 1999) **(Exh. US/B-3(c))**; *see also*, *LTFV Final Determination,* 64 Fed. Reg. at 24361 (NSC) and 24363 (NKK) **(Exh. JP-12)**.

[22] *LTFV Final Determination,* 64 Fed. Reg. at 24361 **(Exh. JP-12)**.

10. On May 6, 1999, Commerce published its Final Determination of Sales at Less Than Fair Value ("LTFV Final Determination").[23] The dumping margins in the LTFV Final Determination were: NSC, 19.65 percent; NKK, 17.86 percent; KSC, 67.14 percent; "All Others," 29.30 percent.[24]

11. The LTFV Final Determination included a final negative determination of critical circumstances for NSC and NKK.[25] Therefore, the Final Determination stated that cash deposits or bonds posted by NSC and NKK for the critical circumstances period were to be refunded or released, respectively.[26] However, the Department continued to find that critical circumstances existed as to KSC and the "all others" group, taking into consideration their final margins and the evidence of record as to importer knowledge of injury and as to massive imports.[27]

12. On June 23, 1999, the USITC published its final determination, finding that an industry in the United States was materially injured by reason of imports of the subject merchandise.[28] The USITC also found that critical circumstances did not exist for these products.[29]

13. On June 29, 1999, Commerce published its antidumping duty order in this case. Therein, Commerce stated that it would order the release of all entries made prior to the preliminary determination of sales at less than fair value (*i.e.*, the "critical circumstances" entries).[30]

14. On November 18, 1999, the Government of Japan formally invoked the dispute settlement provisions of GATT 1994, by requesting consultations with the U.S. Government with respect to

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[23] *Id.* at 24329.

[24] *Id.* at 34780.

[25] *Id.* at 24337; *Memorandum from Roland L. MacDonald to Joseph A. Spetrini: Final Determination of Critical Circumstances* (hereinafter "*Final Critical Circumstances Memo*"), at 2 (April 28, 1999) **(Exh. US/B-4)**.

[26] *LTFV Final Determination*, 64 Fed. Reg. at 24370 **(Exh. JP-12)**.

[27] *Id.* at 24337-38; *Final Critical Circumstances Memo* **(Exh. US/B-4)**.

[28] *Certain Hot-Rolled Steel Products From Japan* ("*USITC Final Determination*"), 64 Fed. Reg. 33514 (June 23, 1999) **(Exh. JP-13)**.

[29] *Id.*

[30] *Antidumping Duty Order: Certain Hot-Rolled, Flat-Rolled Carbon-Quality Steel Products From Japan* (hereinafter, "*Hot-Rolled Steel Order*"), 64 Fed. Reg. 34778 (June 29, 1999) **(Exh. JP-15)**.

this case. Japan has set forth, at paragraphs 9-13 of its brief, the procedural background of the dispute resolution process with respect to this case.

15. For the convenience of the Panel, further facts relating to the underlying administrative case have been organized in terms of the issues raised for review and set forth below. In addition, each section of argument pertaining to each issue covers the facts as necessary to the argument of that issue.

## II. Application of Facts Available with Regard to KSC

16. On October 19, 1998, Commerce issued Section A of its antidumping questionnaire to KSC,[31] concerning its general corporate structure. This was followed by sections B-E of its questionnaire on October 30, 1998, which covered, among other matters, the prices of KSC's sales to the United States, including its affiliated further manufacturers. During November and December of 1998 and January of 1999 – prior to Commerce's preliminary determination -- the Department received responses to these initial and supplemental questionnaires.[32]

17. During this time, an issue arose with respect to the Department's request that KSC provide it with data on sales to affiliates located in the United States. In letters to the Department dated November 10, December 3, and December 18, 1998, KSC requested that it be excused altogether from reporting sales to affiliates located in the United States that further manufactured subject hot-rolled steel into non-subject merchandise.[33] These two U.S. affiliates were California Steel Industries ("CSI") and VEST, Inc. ("VEST").[34] With regard to CSI, KSC explained that it was a 50/50 joint venture between KSC and a Brazilian company, Companhia Vale de Rio Doce ("CVRD"). Moreover, KSC explained that CSI was a petitioner in the investigation and that a CSI executive was a witness for the petitioners in the preliminary injury conference at the International Trade Commission, claiming that CSI was injured by hot-rolled steel from Japan.[35]

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[31] *LTFV Preliminary Determination*, 64 Fed. Reg. 8291, 8292 (February 19, 1999), **(Exh. JP-11)**.

[32] *Id.*

[33] Letter from KSC to Secretary of Commerce (November 10, 1998) **(Exh. JP-42(i))**; Letter from KSC to Secretary of Commerce, 3 Dec. 1998, **(Exh. US/B-5)**; Letter from KSC to Secretary of Commerce (December 18, 1998) **(JP-42(n))**; *see also KSC Preliminary Analysis Memo* (February 12, 1999) **(Exh. US/B-6)**.

[34] *Id.*

[35] *Id.*

18. Domestic interested parties contested KSC's request for exemption from reporting these sales in their comments dated November 25, 1998,[36] and KSC rebutted these comments on November 27, 1998. In further questionnaires issued December 4, 1998 and January 4, 1999, the Department continued to request that KSC report the necessary data concerning its sales through the affiliated manufacturers.[37] On January 25, 1999, instead of responding to Commerce's Section E questionnaire (which requests information on further manufacturing by affiliated companies), KSC reiterated that it was unable to do so because CSI refused to cooperate and because VEST did not have computerized records and lacked a systematic method of tracing further manufactured sales.[38] KSC did not allege that CSI was unable to provide the requested information.[39]

19. The Department issued its Preliminary Determination of sales at less than fair value on February 12, 1999.[40] The Department preliminarily determined to disregard KSC's sales made through VEST, because they accounted for less than five percent of KSC's U.S. sales.[41] With regard to KSC's sales through CSI, the Department preliminarily determined that it was inappropriate to disregard these sales because they accounted for a substantial portion of KSC's U.S. sales.[42] The Department further preliminarily determined that KSC and CSI had failed to cooperate by not acting to the best of their ability to comply with the Department's request for information as to these sales. Therefore, the Department based its preliminary margin for the KSC/CSI sales upon adverse facts available.[43] As facts available, Commerce applied the highest product-specific weighted-average margin for KSC to the quantity of subject merchandise KSC sold through CSI during the period of investigation (" POI").[44] The margins for the KSC/CSI

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[36] Letter from Bethlehem Steel, *et. al.*, to Secretary of Commerce, (November 25, 1998) **(Exh. US/B-7)**.

[37] KSC Supplemental Questionnaire (December 4, 1998) **(Exh. JP-42(k))**, and KSC Supplemental Questionnaire, Section E (January 4, 1999) **(Exh. US/B-8)**.

[38] KSC Supplemental Questionnaire (January 25, 1999) **(Exh. JP-42(v))**.

[39] *Id.*

[40] *LTFV Preliminary Determination*, 64 Fed. Reg. 8291, **(Exh. JP-11)**.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

sales were weight-averaged with the calculated margins for the KSC sales for which the required data had been reported. KSC's overall preliminary margin was the result of that calculation.

20. Commerce conducted its cost verification and sales verifications of KSC in late February and early March of 1999.[45] At the KSC sales verification, Commerce devoted significant time to gathering evidence of KSC's efforts to obtain the necessary data concerning the sales made through CSI.[46] Commerce examined documents relating to KSC's sales through CSI and KSC's interactions with CSI with respect to the Department's request for the data necessary to calculate antidumping margins for those sales. These inquiries revealed, among other things, that, although KSC had made a series of requests to CSI, KSC did not act to the best of its ability to obtain the requested information. Specifically, KSC never raised the issue before the CSI Board, never discussed the matter with its co-owner and joint venture partner, and never attempted to enforce its rights with respect to this matter under its Shareholder's Agreement.[47] On March 26, 1999, Commerce issued its verification report for KSC.[48]

21. On May 6, 1999, Commerce published its Final Determination.[49] As in the Preliminary Determination, the Department found that the absence of the necessary information concerning the KSC/CSI sales required the use of facts available. The Department further determined that the use of an adverse inference was warranted because KSC and CSI, collectively, failed to cooperate with the Department by not acting to the best of their ability to comply with requests for information.[50] Commerce stated that:

> KSC and CSI have neither provided the data on CSI's sales, as requested by the Department, nor demonstrated to the Department's satisfaction that this is not possible. Therefore, the Department finds that KSC and CSI have failed to cooperate by not acting to the best of their ability to comply with the Department's

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[45] *LTFV Final Determination,* 64 Fed. Reg. at 24330 **(Exh. JP-12)**.

[46] KSC Sales Verification Report at 20-22 **(Exh. JP-42(y))**.

[47] *Id.*

[48] *LTFV Final Determination*, 64 Fed. Reg. at 24330 **(Exh. JP-12)**. *See also* KSC Sales Verification Report at 1 **(Exh. JP-42(y))**.

[49] *LTFV Final Determination*, 64 Fed. Reg. 24329 **(Exh. JP-12)**.

[50] *Id.*

> request for information with respect to the CSI sales. Therefore we have used an adverse inference in selecting the facts available with respect to the CSI sales.[51]

In addition, the Department found that KSC had "limited its efforts to merely requesting the required data and otherwise took a 'hands-off' approach with respect to CSI's alleged decision not to provide this data."[52]

22. Commerce selected as facts available for the KSC/CSI sales the second-highest, rather than the highest, product-specific margin for KSC's other U.S. sales, after further examination of the appropriateness of the highest product-specific margin.[53] When the margins for the KSC/CSI sales were weight-averaged with the calculated margins for the U.S. sales for which KSC had provided the requested information, the overall final margin for KSC was 67.14 percent, slightly lower than the Preliminary Determination margin.[54]

## III. Application of Facts Available to NSC and NKK for Conversion Factors

23. On October 30, 1998, Commerce issued Sections B (home market sales) and C (U.S. sales) of its questionnaire to NSC, NKK and KSC. The questionnaire included a request for weight conversion factors so that export sales and home market sales could be compared on a common weight basis. Specifically, the Department's questionnaire clearly stated that if respondents report both actual weights of hot-rolled steel on some sales and weights expressed on a different basis on other sales, they "must" provide the Department with the conversion factor used to arrive at a uniform quantity of measure, as well as the converted quantity for such sales.[55]

24. Steel can be sold on a dollar per actual ton basis or on a dollar per ton theoretical weight basis. The former is based on the actual weight of the product sold. The latter is uses a calculated weight, based on the dimensions of the product and its theoretical mass. These are, in effect, different unit measures: a $300 per actual ton price may be less than or greater than a $300 per theoretical weight price, and there can be significant differences between the two. It is impossible to meaningfully compare a $300 per actual ton price in the U.S. market to a $300 per

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[51] *Id.* at 24368

[52] *Id.*

[53] *Id.* at 24369.

[54] *Id.* at 24370.

[55] Department's Initial Section B-E questionnaire, at B-19 and C-17 (October 30, 1998) (**Exh. JP-45(a)**).

theoretical ton price in the home market without some conversion factor to put the prices on the same basis.

25. Commerce gave respondents 52 days to respond to the questionnaire, after granting their requests for a two-week extension beyond the original deadline.[56] Respondents replied to the questionnaire on December 21, 1998.[57] KSC stated that it did not measure actual weight when the order was placed on a theoretical weight basis, but nevertheless provided factors for use in converting theoretical weight to actual weight for various categories of subject merchandise.[58] NSC declined to provide the factor Commerce had requested, stating (incorrectly, as the Department later learned) that "NSC quantity types are consistent within product type" (in other words, claiming that the conversion factor was not necessary).[59] After stating that "{i}t is not possible to convert a theoretical weight into an actual weight," NKK claimed (incorrectly, as the Department later learned) that none of its home market theoretical weight transactions corresponded to products matched to U.S. sales; accordingly, NKK did not submit a conversion factor for the theoretical weight sales.[60]

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[56] *See* Letter from Program Manager to law firm of Gibson, Dunn & Crutcher(November 19, 1998) (granting extension to NSC) **(Exh. US/B-9)** and Letter from Program Manager to law firm of Willkie Farr & Gallagher (December 1, 1998) (granting extension to NKK) **(Exh. US/B-10)**.

[57] *See* KSC Initial Section B Responses at B-23-24 and Exh. B-6 (December 21, 1998) **(Exh. JP-45(e))**, and KSC Initial Section C Questionnaire Responses at C-26-27 and Exh. C-6 (December 21, 1998) **(excerpts at Exh. US/B-11)**; NSC Initial Section B-D Questionnaire Response at B-22 (December 21, 1998) **(excerpts at Exh. JP-29(a))**; NKK Initial Section B-D Questionnaire Response at B-30 (December 21, 1998) **(excerpts at Exh. JP-45(b))**.

[58] KSC Initial Section B Questionnaire Response at B-23-24 and Exh. B-6 (December 21, 1998) **(JP-45(e)**; KSC Initial Section C Questionnaire Response at C-26-27 and Exh. C-6 (December 21, 1998) **(Exh. US/B-11)**.

[59] NSC Initial Questionnaire Response at B-22 (December 21, 1999) **(excerpts at Exh. JP-29(a))**. NSC later acknowledged that a small number of its U.S. sales of hot-rolled coil were made on a theoretical weight basis, whereas all home market sales of hot-rolled coil were made on an actual weight basis. NSC Section B-D Supplementary Questionnaire Response at B-24-25 (January 25, 1999) **(excerpts at Exh. US/B-12)**.

[60] NKK Initial Section B-D Questionnaire Response at B-30 (December 21, 1998) **(excerpts at Exh. JP-45(b))**

26. On January 4, 1999, Commerce renewed its request that NSC and NKK provide a factor for converting actual and theoretical weight sales to a common basis.[61] Commerce gave both companies an additional 21 days to provide the requested conversion factors, after granting their requests for a one-week extension beyond the supplemental questionnaire's original deadline.

27. In their January 25, 1999, responses to the Department's second request for conversion factors, both companies again declined to provide the requested data. NSC claimed (again incorrectly) that it did not weigh merchandise sold on a theoretical weight basis, and thus had "no way of calculating" the requested conversion factor.[62] In its response of the same date, NKK reiterated that it would be impossible to convert theoretical weight to actual weight and impractical to do the inverse and that none of the theoretical weight transactions was associated with a product matched to U.S. sales.[63]

28. NSC had a small quantity of U.S. sales reported on a theoretical weight basis that had to be compared, for dumping purposes, to reported home market sales made on an actual weight basis. Similarly, although NKK reported all of its U.S. sales on an actual weight basis, a small number of its home market sales that had to be compared to U.S. sales were reported on a theoretical weight basis. Thus, a price per actual ton in one market would have to be compared to a price per theoretical ton in the other market. A meaningful comparison required that that Department convert these prices, as closely as possible, to a common basis. But NSC and NKK failed to provide the conversion factors needed to do this. Consequently, in its preliminary dumping determination issued on February 12, 1999,[64] Commerce assigned a facts available margin to NSC's and NKK's sales affected by the absence of a weight conversion factor. As facts available for NSC's affected U.S. sales, the Department preliminarily assigned NSC's highest calculated product-specific margin.[65] For NKK's sales affected by the missing conversion factors,

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[61] NSC Section B-C Supplementary Questionnaire at 5 (January 4, 1999) **(Excerpts at Exh. US/B-13)**; NKK Section B-D Supplementary Questionnaire at 2 (January 4, 1999) **(Excerpts at Exh. US/B-14)**.

[62] NSC Section B-D Supplementary Questionnaire Response at B-24-25 (January 25, 1999) **(Excerpts at Exh. US/B-12)**.

[63] NKK Section B-D Supplementary Questionnaire Response at BS-14-15 (January 25, 1999) **(Excerpts at Exh. US/B-15)**.

[64] *LTFV Preliminary Determination*, 64 Fed. Reg. 8291 (Exh. JP-11).

[65] *Id.* at 8298.

the Department preliminarily used, as normal value for each home market transaction involving a theoretical weight, the highest calculated normal value for any product.[66]

29. On February 22, 1999, ten days after Commerce issued its preliminary determination, NSC submitted a weight-conversion factor, claiming that, "{a}t the time of the previous filing, NSC was unable to determine an appropriate ratio."[67] NKK also submitted a weight-conversion factor on February 22, 1999.[68] NKK explained that what another respondent, KSC, had done was merely to provide a factor to derive a more accurate *estimate* of actual weight than that expressed by theoretical weight; thus, NKK provided such a factor.[69] NSC and NKK submitted additional data relevant to the conversion factor calculations on March 1, 1999 (data supporting a new, corrected conversion factor) and March 4, 1999, respectively.[70] However, Commerce determined that the conversion factor data had been untimely filed, long after the deadlines for the original and supplemental questionnaire responses had passed. Therefore, consistent with its regulations

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[66] *Memorandum from Team to File: Analysis of Data Submitted by NKK Corporation ("NKK") for Final Determination of Investigation* (hereinafter, "*NKK Final Analysis Memo*"), at 3, 5 (April 28, 1999) (explaining that, contrary to what inadvertently was indicated in its preliminary determination analysis memorandum, the Department had applied, in both the preliminary and final determination programming, the highest calculated normal value for any product to all of NKK's theoretical weight sales) **(Exh. US/B-16)** . The *LTFV Preliminary Determination* had also inadvertently stated that the Department, in the preliminary determination, had applied the highest calculated normal value on a product-specific basis. 64 Fed. Reg., at 8298 **(Exh. JP-11)**.

[67] *See* NSC Letter resubmitting redacted versions of submissions containing untimely new information on the weight-conversion factor (April 14, 1999), at 6 of the redacted February 22, 1999 submission **(excerpts at Exh. US/B-1)**. The original NSC submissions containing weight conversion factors and supporting data, at **Exhibits JP-29(d) and (e)**, are no longer part of the official record in this case; thus, the Panel should not rely upon them.

[68] *See* NKK Letter resubmitting redacted versions of submissions containing untimely new information on the weight-conversion factor (April 19, 1999), at 4-8 of the redacted February 22, 1999 submission **(excerpts at Exh. US/B-2)**. The original NKK submissions containing weight conversion factors and supporting data, including **Exhibit JP-45(g)**, are no longer part of the official record in this case; thus, the Panel should not rely upon them.

[69] *Id.* at 5-6 of the redacted February 22, 1999 submission.

[70] NSC Letter resubmitting redacted versions of submissions containing untimely new information on the weight-conversion factor (April 14, 1999) at 3 and Exh. 8 of the redacted March 1, 1999 submission **(excerpts at Exh. US/B-1)**; NKK Letter resubmitting redacted versions of submissions containing untimely new information on the weight-conversion factor (April 19, 1999), at the redacted March 4, 1999 submission (removing affected data without narrative) **(excerpts at Exh. US/B-2)** . As noted above, the original versions of these submissions are no longer part of the official record and should not be relied upon by the Panel.

and practice, Commerce returned the submissions containing the conversion factors and their supporting data on April 12, 1999.[71]

30. Because NSC and NKK contested the Department's rejection of the untimely conversion factor data and treatment of sales reported on theoretical weight in their respective case briefs, Commerce explained its position on this issue in the Final Determination. With respect to NSC's U.S. sales reported on a theoretical weight basis, the Department continued to reject NSC's untimely provided conversion factor for the final determination, and assigned a margin to the affected sales based on the facts available.

> In the instant case, NSC failed to submit the requested {conversion factor} information by December 21, 1998 (the deadline for the original Section B and C questionnaire responses), nor did it provide this information by January 25, 1999 (the deadline for submission of information requested in Section B and C supplemental questionnaire). Despite repeated requests for this information, NSC did not provide the requested data until March 1, 1999 (nearly 3 months after the initial questionnaire deadline).
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> * * *
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> NSC's only response was that the data did not exist. While NSC characterizes that statement as a correctable minor error, we disagree. The evidence indicates that the requested information was routinely maintained by NSC in the normal course of business, but that obtaining it was simply not a priority. Regardless of who specifically knew about this information, the sales department or the production department, the data existed and could have easily been obtained. The fact that NSC was able to provide this information shortly after the preliminary determination also supports the conclusion that it could have done so within the time requested. Moreover, it is impossible for the Department to determine whether NSC's claims of inadvertent error are valid or merely self-serving. Thus, they are insufficient to rebut the evidence establishing that the requested information was readily available.

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[71] Letter from Program Manager to NSC rejecting NSC factor information at 3 (April 12, 1999) **(Exh. US/B-3(c))**; Letter from Program Manager to NKK at 3 (April 12, 1999) **(Exh. US/B-3(a))**; *see also*, *LTFV Final Determination*, 64 Fed. Reg. at 24361 (NSC) and 24363 (NKK) **(Exh. JP-12)**.

> Furthermore, timely, accurate conversion information is necessary to the margin calculation and can have a significant impact. In recognition of steel industry practices, the Department routinely requests respondents in proceedings involving steel to provide either the actual and theoretical weights of the transactions in both markets, or in the alternative, to provide conversion factors to ensure apples to apples comparisons on the same weight basis. The need for timely filed, verifiable actual weights or conversion factors is particularly acute with flat rolled steel products in coils, including those at issue. Assuming that the coils meet the specifications of the ordered product, the actual width and the actual thickness of the coils will vary within the allowed tolerances, but the lengths of the coils are not specified in the available sales-related documentation. Therefore, the total actual weight of the coils sold in transactions denominated in theoretical weight can vary by a significant, but unknown amount, as the actual dimensions of the coils cannot be determined. Accordingly, the resulting unit values that would be used in the Department's price-to-price comparisons could also vary by a significant, but unknown amount.[72]

Moreover, Commerce found that "by not submitting a theoretical weight conversion factor it could have provided when originally requested until well after the time for response had passed, {NSC} failed to cooperate by not acting to the best of its ability."[73] Consequently, the Department applied an adverse inference in selecting the facts available "so as to effectuate the statutory purposes of the adverse facts available rule, which is to induce respondents to provide the Department with complete and accurate information in a timely manner."[74] Commerce used, as the margin for each U.S. sale reported based on theoretical weight (*i.e.*, different weight units from the home market sales to which they had to be compared) the average of the highest calculated sale-specific margins for each of the products involved in the theoretical weight sales.[75]

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[72] *LTFV Final Determination*, 64 Fed. Reg. at 24361 (citations omitted) **(Exh. JP-12)**.

[73] *Id.*

[74] *Id.* at 24362.

[75] *Id.* Commerce calculated a margin for the affected U.S. sales as follows. First, it isolated the products sold on a theoretical weight basis, and then identified U.S. sales of those same products that were made on an actual weight basis. The Department calculated a margin for each of the actual weight sales, identified the highest margin for each product, averaged these margins, and applied the resulting margin to the U.S. theoretical weight

31. With respect to NKK's home market sales reported on a theoretical weight basis, the Department also continued to reject NKK's untimely provided conversion factor, and assigned a normal value to the affected sales based on the facts available. As with NSC, the Department noted the long delay in submitting the conversion factors.[76] Moreover, after finding that NKK had failed to act to the best of its ability because it could have provided the conversion factor when originally requested, Commerce used an adverse inference in selecting the normal value for those sales.[77] The Department explained:

> NKK's claims that it could calculate a conversion factor in February of 1999, but was unable to derive such a factor when the questionnaire responses were due, does not withstand scrutiny. Although NKK argues that it did not understand what the Department wanted when it originally requested a "conversion factor", although this was not stated at the time, and that it lacked the data necessary to calculate one, . . . it should have proposed to the Department the sort of conversion factor it ultimately did calculate, explaining why a more accurate one might not be practicable. Instead, NKK merely dismissed the Department's repeated requests. The fact that NKK ultimately did provide such a factor is the proof that they could have done so much earlier.[78]

As in the preliminary determination, Commerce used, as normal value for each home market transaction involving a theoretical weight, the highest NKK normal value for any product.[79]

## IV. Exclusion of Facts Available Margins from the All others Rate

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sales. *Memorandum from Team to File: Analysis of Data Submitted by Nippon Steel Corporation ("NSC") for Final Determination of Investigation* (hereinafter, "*NSC Final Analysis Memo*") at 6 (April 28, 1999) **(Exh. US/B-17)**.

[76] *LTFV Final Determination*, 64 Fed. Reg. at 24363 **(Exh. JP-12)**.

[77] *Id.* at 24363-64.

[78] *Id.*

[79] *Id.* at 24364; *NKK Final Analysis Memo* at 3 **(Exh. US/B-16)**.

32. The petition submitted to the Department in September of 1998 identified six steel producers as possible exporters of hot-rolled steel from Japan.[80] These companies were NSC, NKK, KSC, Sumitomo Metal Industries ("Sumitomo"), Kobe Steel, Ltd. ("Kobe"), and Nisshin Steel Co. Ltd. ("Nisshin").[81] On October 19, 1998, Commerce issued Section A of its antidumping questionnaire to these six Japanese steel producers.[82]

33. Based on production-volume information received from these producers, and because it was not practicable for the Department to examine all the Japanese producers fully, Commerce selected NSC, NKK and KSC as respondents on October 30, 1998 and advised the remaining companies that they were excused from responding to Section A.[83] Commerce therefore issued sections B-E of its antidumping questionnaire only to NSC, NKK and KSC.[84] Commerce's selection of the respondents whose company-specific data would be used to calculate anti-dumping margins was made pursuant to section 777A(c)(2)(B) of the Act, which implements Article 6.10 of the Anti-dumping Agreement. That article permits authorities to limit their examination to "the largest percentage of the volume of the exports from the country in question which can reasonably be investigated" when when the number of exporters involved is so large as to make it impracticable to determine an individual margin for each exporter.

34. The Department issued its Preliminary Determination of sales at less than fair value on February 12, 1999.[85] The dumping margins in the LTFV Preliminary Determination for the three examined respondents were: NSC, 25.14 percent; NKK, 30.63 percent; KSC, 67.59 percent.[86]

35. In accordance with section 735(c)(5) of the Act, which implements Article 9.4 of the Agreement, and using the Department's normal methodology for this purpose, the Preliminary Determination also provided a margin for the non-selected companies, called the "all others"

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[80] *Initiation Notice*, 63 Fed. Reg. at 56610 **(Exh. JP-6)**.

[81] *Id.*

[82] *Cf. id. with LTFV Preliminary Determination*, 64 Fed. Reg. 8291, 8292 **(Exh. JP-11)**.

[83] *LTFV Preliminary Determination*, 64 Fed. Reg. at 8292 **(Exh. JP-11)**. The three companies selected were those with the largest volume of exports to the United States, according to the production-volume information they submitted in response to the Department's questionnaires. *Id.*

[84] *Id.*

[85] *Id.* at 8291.

[86] *Id.* at 8299.

margin, based on the data submitted by the selected companies.[87] The "all others" margin in the Preliminary Determination, 35.06 percent, was the weighted average of the margins calculated for NSC, NKK and KSC.[88] This is the methodology provided for in section 735(c)(5)(A) of the Act, which states that the "all others" rate shall be an amount equal to the weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins based entirely on the facts available.[89]

36. During the comment period, no party challenged the methodology the Department had used for calculating the all others rate.[90] Furthermore, no party challenged the manner in which this methodology was applied. This is particularly noteworthy, given the fact that Sumitomo, one of the companies subject to the all others rate, submitted a case brief making arguments with respect to two other issues, and could easily have commented on the all others rate at the same time if it had concerns with respect to that issue.[91]

37. On May 6, 1999, Commerce published its Final Determination.[92] The dumping margins in the Final Determination for the selected respondents were: NSC, 19.65 percent; NKK, 17.86 percent; KSC, 67.14 percent.

38. In the Final Determination, the Department continued to apply its standard all others rate methodology, calculating that rate as the weighted average of the margins calculated for NSC, NKK and KSC.[93] The final all others rate was 29.30 percent. Because no party had challenged

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[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *LTFV Final Determination*, 64 Fed. Reg. 24329 *et seq.*, *passim* **(Exh. JP-12)**.

[91] *Id.* at 24337 (Comment 2) and 24364 (Comment 31). Japan's suggestion at para. 134 of its brief that Sumitomo Metal Industries "strenuously argued" against the Department's all others methodology is belied by the very document they rely upon, Sumitomo's case brief **(Exh. US/B-19)**. Sumitomo sought to lower its margin by arguing against adverse treatment of Kawasaki's CSI sales, which affected the Kawasaki's margin and thus the weighted average all others rate.

[92] *LTFV Final Determination*, 64 Fed. Reg. at 24329 **(Exh. JP-12)**.

[93] *Cf. LTFV Preliminary Determination*, 64 Fed. Reg. at 8299 **(Exh. JP-11)** *with Final Determination*, 64 Fed. Reg. at 24331 ("Changes From the Department's Preliminary Determination," showing no change in this respect) **(Exh. JP-12)**.

this methodology in the case briefs, the Department did not include any further explanation in the Final Determination of its uncontested methodology for determining the all others rate.

## V. Application of the "Arm's Length" Test to Affiliated Customers to Determine Normal Value

39. In calculating its preliminary dumping margins, the Department excluded from its analysis sales to affiliated customers in the home market which were not made at arm's length prices, because the Department considered them to be outside the ordinary course of trade.[94] The Department described its "arm's length test" as follows:

> To test whether these sales were made at arm's length prices, we compared on a model-specific basis the prices of sales to affiliated and unaffiliated customers net of all discounts, rebates, billing adjustments, movement charges, direct selling expenses, and packing. Where, for the tested models of subject merchandise, prices to the affiliated party were on average 99.5 percent or more of the price to unaffiliated parties, we determined that sales made to the affiliated party and used those sales in determining NV {normal value}. *See* 19 CFR 351.403(c). In instances where no price ratio could be constructed for an affiliated customer because identical merchandise was not sold to unaffiliated customers, we were unable to determine that these sales were made at arm's length prices and , therefore, excluded them from our LTFV analysis. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Argentina*, 58 FR 37062, 37077 (July 9, 1993). Where the exclusion of such sales eliminated all sales of the most appropriate comparison product, we made a comparison to the next most similar product.[95]

40. Following the Preliminary Determination, NKK contested, among other issues, the Department's methodology for determining when sales to affiliated customers in the home market will be deemed to be at "arm's length" ("the arm's length test").[96] With respect to NKK's challenge to the Department's arm's length test, the Department continued to use, in its Final Determination, its established methodology, which the Court of International Trade has

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[94] *LTFV Preliminary Determination* at 8295, *citing* 19 C.F.R. § 351.102 (definition of "ordinary course of trade") **(Exh. JP-11)**.

[95] *Id.* at 8295.

[96] *LTFV Final Determination*, 64 Fed. Reg. at 24341-42 **(Exh. JP-12)**.

repeatedly sustained.[97] The Department noted that, although NKK had proposed an alternative methodology based on a statistical approach, it had not demonstrated that the current methodology was unreasonable.[98] The Department also explained that it applies the arm's length test on a customer-by-customer, rather than a product-by-product, basis because "the question underlying the test is whether affiliation between the seller and the customer has (in general) affected pricing."[99]

## VI. Critical Circumstances and Retroactive Application of Anti-dumping Duties

41. On September 30, 1998, U.S. domestic steel producers filed a petition with the Department of Commerce and the USITC seeking relief from unfairly dumped imports.[100] This petition (including amendments)[101] contained allegations of dumping and injury, along with approximately 800 pages of factual data and support.[102]

42. In response to the allegations and accompanying factual information, the Department of Commerce analyzed the sufficiency of the petition in order to determine whether it was proper to initiate an investigation.[103] Specifically, the Department analyzed the less than fair value and injury allegations, and determined that the petition contained, among other things, sufficient

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[97] *Id.* at 24342-43.

[98] *Id.* at 24342.

[99] *Id., citing Micron Technology, Inc. v. United States*, 893 F. Supp. 21 (CIT 1995) and *Torrington Co. v. United States*, 960 F. Supp. 339 (CIT 1997).

[100] *See Petition for the Imposition of Antidumping Duties* **(Exhs. US/B-40a, 40b and 40c).**

[101] After receiving the initial petition, the Department sent petitioners a questionnaire requesting additional information and supporting documentation. *See* Letter from the Department to Skadden, Arps, Slate, Meagher & Flom LLP (October 6, 1998) **(Exh. US/B-41)**. In the questionnaire, the Department requested, among other things, additional supporting documentation pertaining to claimed import volumes, material injury, and knowledge by Japanese producers of the potential investigation. *Id.* In response to the questionnaire, the petitioners filed amendments to the petition on October 9, 1998 and October 14, 1998 containing additional explanation and supporting documentation as requested.

[102] *See Petition for the Imposition of Antidumping Duties* **(Exhs. US/B-40a, 40b and 40c).**

[103] *Import Administration AD Investigation Initiation Checklist, Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products from Japan, Brazil and the Russian Federation* at 6-8 (Oct. 19, 1998) (hereinafter *Initiation Checklist*) **(Exh. US/B-18)**.

factual support relating to (1) volume and value of imports; (2) U.S. market share (*i.e.*, the ratio of imports to consumption); (3) actual pricing (*i.e.*, evidence of decreased pricing); (4) relative pricing (*i.e.*, evidence of imports under-selling U.S. products); (5) prices or costs and claimed adjustments; (6) home market pricing (market research reports including affidavits); (7) current pricing data (no more than one year old); (8) price and cost data from contemporaneous time periods; (9) correct currency rates used for all conversions to U.S. dollars; and (10) conversion factors for comparisons of differing units of measure.[104] In addition to analyzing the "sufficiency of the allegations," the Department further assessed the reliability of the factual support, by corroborating the evidence with publicly available data.[105]

43. After reviewing the allegations and factual support contained in the petition, the Department determined that there existed reasonable grounds to believe or suspect sales were being made below cost.[106] As a result, the Department published a notice of initiation of an anti-dumping investigation on October 22, 1998.[107]

44. On November 16, 1998, the USITC notified the Department of its affirmative preliminary finding of threat of material injury in this case.[108]

45. On November 30, 1998, Commerce published its preliminary critical circumstances determination.[109] In reaching its preliminary determination as to whether critical circumstances existed, the Department found, based on the evidence before it, a massive surge in import

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[104] *See id.*

[105] *See id.* Attachment at 15-16.

[106] *See id.* at 6-8.

[107] *See Initiation of Antidumping Duty Investigation: Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products From Brazil, Japan and the Russian Federation,* 63 Fed. Reg. 56607, 56607 (October 22, 1998) **(Exh. JP-6).**

[108] *Certain Hot-Rolled Steel Products From Brazil, Japan and Russia*, 63 Fed. Reg. 65221 (November 25, 1998) **(Exh. JP-7)**.

[109] *Preliminary Determination of Critical Circumstances: Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan and the Russian Federation* ("*Critical Circumstances Preliminary Determination*"), 63 Fed. Reg. 65750, 65751 (November 30, 1998) **(Exh. JP-9)**; *see also The Department's Preliminary Critical Circumstances Memorandum* ("*Preliminary Critical Circumstances Memo*") at 2-4 (November 23, 1998) **(Exh. US/B-42)**.

volumes in which "imports of hot-rolled steel from Japan increased by more than 100 percent."[110] This was more than six times greater than the 15 percent increase needed to establish massive imports under the Department's established practice.[111] The Department also found that importers knew or should have known both that the respondents were selling the subject merchandise at less than fair value and that there was likely to be material injury.[112] It based this determination on the fact that the dumping margins documented in the petition were in excess of 25 percent, on the ITC's preliminary determination of threat of injury, and on other publicly available information, including "numerous press reports . . . regarding rising imports, falling domestic prices resulting from rising imports, and domestic buyers shifting to foreign suppliers."[113] The Department also considered comments submitted by the respondents on this issue.[114] Based upon these findings and the arguments presented, the Department determined that it was proper to issue a preliminary affirmative determination of critical circumstances.[115]

46. During November and December of 1998 and January of 1999, Commerce received responses to initial and supplemental questionnaires.[116]

47. On February 12, 1999, the Department issued its Preliminary Determination of Sales at Less Than Fair Value.[117] The dumping margins reflected in the LTFV Preliminary Determination were: NSC, 25.14 percent; NKK, 30.63 percent; KSC, 67.59 percent; "All Others," 35.06 percent.[118]

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[110] *Critical Circumstances Preliminary Determination*, 63 Fed. Reg. at 65751 **(Exh. JP-9)**; *Preliminary Critical Circumstances Memo, passim* **(Exh. US/B-42)**

[111] *Critical Circumstances Preliminary Determination* at 65750 **(Exh. JP-9)**; *see also* 19 C.F.R. § 351.206(h)(2).

[112] *Critical Circumstances Preliminary Determination*, 63 Fed. Reg. 65750 **(Exh. JP-9)**; *see also Preliminary Critical Circumstances Memo* at 2-4 **(Exh. US/B-42)**.

[113] *Id.*

[114] *See Preliminary Critical Circumstances Memo* at 3 **(Exh. US/B-42)**

[115] *Critical Circumstances Preliminary Determination,* 63 Fed. Reg. at 65751 **(Exh. JP-9)**

[116] *LTFV Preliminary Determination,* 64 Fed. Reg. at 8292 **(Exh. JP-11)**.

[117] *Id.* at 8291.

[118] *Id.*

48. Pursuant to its earlier preliminary critical circumstances finding, the Department at this point ordered suspension of liquidation for entries made 90 days prior to the publication of the Preliminary Determination of Sales at Less Than Fair Value.

49. Following the issuance of the LTFV Preliminary Determination, various Japanese respondents filed case briefs contesting, among other issues, the Department's critical circumstances determination.[119] Respondents challenged each aspect of the critical circumstances determination.[120] Specifically, with respect to the Department's determination that importers had knowledge of dumping, respondents argued that the Department erred when it relied on what they called the mere allegations in the petition as a basis for determining the margins of dumping.[121] With respect to the Department's determination that importers had knowledge that the dumping was likely to cause injury to the U.S. domestic industry, respondents argued that, because the USITC preliminary determination of injury did not find current material injury, the Department could not impute knowledge of injury.[122] Finally, with respect to the Department's determination that massive imports existed, respondents argued that the Department incorrectly deviated from its normal practice by selecting a different comparison period for determining the volume of imports.[123] Thus, based upon these contentions, respondents argued that there was insufficient evidence in the record to support the findings leading to the affirmative critical circumstances determination.[124]

50. On May 6, 1999, Commerce published its LTFV Final Determination.[125] The dumping margins reflected in the LTFV Final Determination were: NSC, 19.65 percent; NKK, 17.86 percent; KSC, 67.14 percent; "All Others," 29.30 percent.[126]

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[119] *LTFV Final Determination*, 64 Fed. Reg. at 24335-24339 **(Ex. JP-12)**.

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.* at 34780.

51. The Final Determination also included a final negative determination of critical circumstances as to NSC and NKK, both of which had final dumping margins below the 25 percent threshold the Department uses to impute importer knowledge of dumping.[127] Therefore, the Final Determination stated that cash deposits or bonds posted by NSC and NKK for the critical circumstances period were to be refunded or released, respectively.[128] However, the Department continued to find that critical circumstances existed as to KSC and the "all others" group, taking into consideration their final margins and the evidence of record as to importer knowledge of injury and as to massive imports.[129]

52. On June 23, 1999, the ITC published its final determination, finding that an industry in the United States was materially injured by reason of imports of the subject merchandise.[130] The ITC found, however, that critical circumstances did not exist for these products.[131]

53. On June 29, 1999, Commerce published its antidumping duty order in this case. Therein, Commerce stated that it would order the release of all entries made prior to the preliminary determination of sales at less than fair value.[132]

## ARGUMENT

## I. The Agreement Permits Administering Authorities to Use Adverse Inferences in Selecting the Facts Available Where a Party Has Not Cooperated in an Investigation

### A. Introduction

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[127] *Id.* at 24337; *Memorandum from Roland L. MacDonald to Joseph A. Spetrini: Final Determination of Critical Circumstances* (hereinafter "*Final Critical Circumstances Memo*") at 2 (April 28, 1999) **(Exh. US/B-4)**.

[128] *LTFV Final Determination,* 64 Fed. Reg. at 24370 **(Ex. JP-12)**.

[129] *Id.* at 24337-38; *Final Critical Circumstances Memo, passim* **(Exh. US/B-4)**.

[130] *Certain Hot-Rolled Steel Products From Japan* ("*ITC Final Determination*"), 64 Fed. Reg. 33514 (June 23, 1999) **(Exh. JP-13)**.

[131] *Id.*

[132] *Antidumping Duty Order: Certain Hot-Rolled, Flat-Rolled Carbon-Quality Steel Products From Japan* (hereinafter, "*Hot-Rolled Steel Order*"), 64 Fed. Reg. 34778 (June 29, 1999) **(Ex. JP-14)**.

54. As we explain in detail below, the Department applied adverse facts available to KSC after KSC failed to compel CSI (the joint venture in which KSC and a Brazilian company each held a 50 percent interest) to respond to the constructed-export-price portion of the antidumping questionnaire. In addition, the Department applied adverse facts available to NSC and NKK when they did not submit information that would have permitted the Department to convert sales based on theoretical weights into actual weights. The decisions affected the margins for NSC and NKK by a *very* small amount.

55. Japan has raised questions about each of these applications in its First Submission, which are addressed individually below. Before getting into the specifics, however, Japan attempts to knock the facts available provision out of the Agreement, by asking the Panel to rule that Commerce may not select the facts available for uncooperative exporters so as to give them any incentive to respond to antidumping questionnaires.

56. Japan argues that "the purpose of any use of facts available is to fill gaps in information *in a manner consistent with existing data*."[133] In other words, if an exporter refuses to report 90 percent of its sales, the Department must use, as facts available, the "existing data" - - the margin for the remaining 10 percent of the sales that the exporter selected to report. Of course, this would allow exporters to manipulate the outcome of antidumping investigations at will, by reporting only that information most favorable to them and withholding the rest.

57. Japan does not shrink from this implication. It candidly explains that the problem with Commerce's practice is that the Department, in selecting facts available, "looks for data that are 'sufficiently adverse' so *as to induce respondents to provide complete and accurate information*" (emphasis added), as if that were a deplorable result.[134] Working from the premise that respondents should *not* be required to provide complete and accurate information, Japan asks the Panel to remove this inducement. If the Panel agrees, the result is inevitable - - respondents will refuse to provide such information, and investigating authorities around the world will have no remedy. Therefore, the most important issue in this proceeding is whether the Agreement actually constrains investigating authorities in this manner.

## B. Article 6.8 of the Agreement Authorizes Adverse Inferences About Uncooperative Respondents

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[133] First written submission of Japan, at para. 58.

[134] Id. at para. 59.

58. Article 6.8 of the Agreement provides in part that, where a party "refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation . . . determinations . . . may be made on the basis of the facts available." Thus, Article 6.8 deals in part with uncooperative parties - - that refuse access to information, submit information late, withhold information, and otherwise impede investigations. In order to deal with such uncooperative parties, Article 6.8 authorizes the application of the "facts available."

59. Article 6.8 does not explicitly provide that the selection of facts available may entail an adverse inference. The inescapable fact, however, is that the use of facts available is the solution to the problem posed by non-cooperative respondents. This strongly implies that administering authorities may employ facts available so as to *solve* the problem which renders their application necessary. Application of the facts available can solve the problem posed by uncooperative respondents *only* if it succeeds in inducing them to cooperate, and the only inducement that will persuade them to cooperate is the prospect of a worse result than if they do not. Investigating authorities have neither the resources nor any legal process (other than the facts available rule) by which they can induce exporters outside their jurisdiction to cooperate in their investigations. Thus, in order to solve the problem that it so clearly identifies, Article 6.8 must authorize the application of adverse inferences to uncooperative respondents.

### C. Annex II of the Agreement Authorizes Adverse Inferences About Uncooperative Respondents

60. Annex II of the Agreement contains guidelines and requirements that investigating authorities must observe when applying facts available under Article 6.8. Paragraph 1 of Annex II provides in part that:

> . . . The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

This underscores in two different ways the strong implication of Article 6.8 that administering authorities may make adverse inferences regarding uncooperative respondents.

61. First, Paragraph 1 explicitly requires investigating authorities to *warn* respondents that, if they do not cooperate, the authorities may apply the facts available. This plainly implies that the consequences of failing to cooperate may be adverse. Otherwise, no warning would be required. Japan would have this panel believe that the Member States crafted Paragraph 1 of Annex II to

make the following statement: "Warning! If you do not cooperate in an investigation, the investigating authority is authorized to apply neutral information that will yield precisely the same result as if you had cooperated fully!" This is absurd, and would reduce Paragraph 1 (and Article 6.8 itself) to a nullity, in contravention of the well-recognized principle of treaty construction rejecting such interpretations.[135]

62. Second, Paragraph 1 explicitly states that the consequences of failing to cooperate in the investigation include making a determination on the basis of the facts in the application for initiation filed by the domestic industry. While the information in an application must be substantiated,[136] it is generally understood that applicants will document the highest degree of dumping that the available evidence will support. Accordingly, while the information in the application is not *necessarily* adverse to the respondents, it generally is presumed to be adverse. Therefore, the authority given to investigating authorities to apply the information in the petition to uncooperative respondents is generally understood to authorize them to make adverse inferences regarding uncooperative respondents.

63. Paragraph 5 of Annex II provides that "even though the information provided may not be ideal in all respects," investigating authorities nevertheless should not reject that information where the respondent "has acted to the best of its ability." This also makes sense only if investigating authorities can make adverse inferences in selecting the facts available to be applied to uncooperative respondents. In such cases, this tells investigating authorities that adverse inferences can be applied *only* to uncooperative respondents, and that the *inability* to cooperate is not a failure to cooperate. In other words, parties who try their best to cooperate should not be sanctioned. This makes sense.

64. In contrast, if Japan's interpretation of Article 6.8 and Annex II is accepted, Paragraph 5 prohibits investigating authorities from disregarding faulty information provided by respondents who acted to the best of their ability, because that would allow those authorities to substitute

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[135] *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, at p. 23.

[136] See Article 5.2 of the Anti-dumping Agreement. Applications must include "such evidence as is reasonably available to the applicant" of dumping. There is no requirement that the evidence be complete, and no requirement that applicants strive to obtain exonerating information. Similarly, Article 5.3 requires only that investigating authorities "examine the accuracy and adequacy of the evidence provided . . . to determine whether there is sufficient evidence to justify the initiation of an investigation." Investigating authorities are not required to determine whether the evidence submitted by the applicants is balanced before determining whether to initiate an investigation.

purely neutral information. Such a prohibition would be absurd, because it would protect respondents from neutral information, from which no protection is needed.

65. Paragraph 6 of Annex II provides that, where an investigating authority does not accept submitted information, it should inform the party "forthwith of the reasons therefore," and give it the opportunity to provide an explanation. If the investigating authority rejects the explanation, it must explain the reasons for doing so in its published determination. This is another of the comprehensive set of safeguards governing the use of facts available. Again, this safeguard make sense *only* if adverse inferences are permitted. There would be no reason to require investigating authorities to give exporters a "last chance" to explain before their information was rejected, if that information could be replaced only with a neutral gap-filler.

66. Paragraph 7 of Annex II squarely states that, where an interested party has not cooperated, the result may be adverse to that party. The last sentence of paragraph 7 states that:

> It is clear, however, that if an interested party does not co-operate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party {that did not cooperate} than if the party did co-operate.

67. Although the exact term "adverse" is not used, a result that is "less favourable" to the exporter is equivalent to a result that is adverse to the exporter, according to the ordinary meaning of those terms.[137] In the context of the Agreement, a "less favourable" result for a responding party is a higher margin. This means that a party that does not cooperate may receive a higher margin than if it had cooperated - - a margin likely to be higher than its actual margin and higher than the neutral margin that would be given to a cooperative respondent. The logical way for an investigating authority to achieve this result is to apply an adverse inference in selecting the facts available to be applied to uncooperative parties.

68. In sum, a careful reading of Article 6.8 and Annex II demonstrates that the Member States intended to provide investigating authorities a means of inducing respondents in antidumping investigations to cooperate by furnishing necessary information in a timely manner. The means of inducing the necessary cooperation was to authorize adverse inferences to be drawn about the

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[137] The term "adverse" has been defined as "{a}cting in opposition; actively hostile" and "{h}urtful; injurious." New Shorter Oxford English Dictionary (1993). The term "favourable," on the other hand, means "propitious," "advantageous," and "facilitating one's purpose or wishes." *Id.* The "adverse inference rule" has been defined as "{t}he principle that if a party fails to produce a witness who is within its power to produce and who should have been produced, the judge may instruct the jury to infer that the witness's evidence is unfavorable to the party's case." Black's Law Dictionary, 7th ed. (1999)(defining the equivalent term "adverse-interest rule").

missing information if it was not supplied. The adverse inference must be that the information that was withheld was unfavorable to the party that withheld it.

### D. The Application of Adverse Inferences to Uncooperative Parties Is Essential to Applying the Agreement as a Practical Matter

69. The reason why the Member States authorized investigating authorities to draw adverse inferences to induce exporters to cooperate is obvious. Overwhelmingly, the data necessary to calculate dumping margins is within the sole possession of the exporters. These parties are completely beyond the reach or even the threat of any process by which national authorities could compel them to supply the necessary information. Therefore, without the facts available rule, they could refuse with complete impunity to cooperate in antidumping investigations, and would do exactly that. The ability to draw adverse inferences regarding uncooperative foreign parties is therefore an essential tool for investigating authorities - - not just to give effect to Article 6.8, but to give effect to the entire Agreement. Any interpretation of the Agreement as not permitting the application of adverse inferences to uncooperative parties would therefore render the entire Agreement a nullity.[138]

70. The WTO Appellate Body has recognized that adverse inferences are a necessary tool for gathering information. In *Canada - Measures Affecting the Export of Civilian Aircraft*, the WTO Appellate Body concluded that WTO panels are permitted to draw adverse inferences from a party's failure to submit relevant evidence to a panel, noting that this view is "supported by the general practice and usage of international tribunals."[139] The Appellate Body explained the importance of adverse inferences as follows:

> {A} party's refusal to collaborate has the potential to undermine the functioning of the dispute settlement system. The continued viability of that system depends, in substantial measure, on the willingness of panels to take all steps open to them to induce the parties to the dispute to comply with their duty to provide information deemed necessary for dispute settlement. In particular, a panel should be willing expressly to remind parties – during the

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[138] "An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility." *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, at p. 23.

[139] WT/DS70/AB/R, 2 August 1999 at para. 202 (hereinafter *Civilian Aircraft*). (In that case, the Panel's review included *de novo* review of evidence, unlike a Panel's review under the Agreement. *See* Preliminary Objections, above at Part A.)

> course of dispute settlement proceedings – that a refusal to provide information requested by the panel may lead to inferences being drawn about the inculpatory character of the information withheld.[140]

71. Similarly, when using an inference against Argentina in *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*,[141] the WTO Panel recognized the parties' duty of collaboration in the presentation of facts and evidence before a panel, obligating the parties to provide relevant documents which are in their sole possession. The Panel noted that a typical "discovery" process "in its common-law system sense, is not available in international procedures."[142] Commerce, like the WTO panels referenced in the cases discussed above, is without typical discovery tools, and must rely on the cooperation of the parties.[143]

### E. The WTO Member States Overwhelmingly Interpret Article 6.8 of the Agreement as Permitting Adverse Inferences About Uncooperative Parties in Antidumping Proceedings

72. Given that interpreting Article 6.8 as permitting the application of adverse inferences to uncooperative respondents is the only interpretation that can be reconciled with the plain language of Article 6.8 and Annex II, and the only interpretation that does not reduce those provisions (and, indeed, the entire Agreement) to a nullity, it is hardly surprising that this is the overwhelming interpretation of Article 6.8 by WTO members that have expressed a view. Adverse inferences have been made, for example, in cases determined by the European

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[140] *Id.* at para. 204.

[141] WT/DS56/R, 25 November 1997 at para. 6.40, as modified on other grounds WT/DS56/AB/R, 27 March 1998. (In that case, the Panel's review included *de novo* review of evidence, unlike a Panel's review under the Agreement. ***See* Preliminary Objections, above at Part A.)**

[142] *Id.*

[143] This has been recognized by the U.S. appeals court reviewing Commerce determinations. *Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565,1571 (Fed. Cir. 1990). In affirming the ability of Commerce to use an adverse inference, appellate courts in the United States have cited the need to induce respondent parties to provide timely, complete, and accurate responses so that the agency can calculate accurate dumping margins. *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990); *Allied-Signal Aerospace Co. v. United States*, 996 F.2d 1185, 1191-92 (Fed. Cir. 1993).

Community,[144] Canada,[145] Australia[146] and Japan.[147] Moreover, Brazil,[148] Ecuador,[149] the

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[144] Under its "well-established practice of penalizing exporters who do not cooperate with the inquiry," "the {European} Community will typically select the highest dumping or injury margin which is determined for exports from that country." Edmond McGovern, *European Community Anti-Dumping Law and Practice*, section 444 at 44:9 (1998). *See, e.g., Glycine from China*, Commission Reg. (EC) No. 1043/2000 (5/18/00) (assigning imports from non-cooperating companies a dumping margin based on the highest dumping margin established for the cooperating exporter with representative export volumes); *Certain Unbleached Fabrics from China, Egypt, Indonesia, Pakistan, and Turkey*, O.J. L. 111, 1998, p. 19, rec. 86 (assigning non-cooperating companies a dumping margin based on "the margin of the company with the highest dumping margin in the sample").

In fact, the European Community has assigned facts available margins that exceeded the highest margin calculated for a cooperating party. *See Polyester Staple Fibers from Australia, Indonesia, and Thailand*, Commission Reg. (EC) No. 124/2000, O.J. L. 16, 2000, p.30, p. 34 rec. 35 (since "there is reason to believe that the high level of non-cooperation results from the non-cooperating exporting producers in the country concerned generally having dumped at a higher level than any cooperating exporting producer," the EC set "residual dumping margin for the non-cooperating companies at a level higher than the highest dumping margin established for a cooperating company"). The European Community also has utilized adverse facts contained in the petition. *See Certain Footwear from China*, Council Reg. (EC) No. 467/98, O.J. L. 60, 1998, n. 1, rec. 40 (imposing on uncooperative exporters "the highest margin of dumping alleged in the complaint").

[145] Where a party fails to provide requested information, values are determined according to a Ministerial specification. Special Import Measures Act §29(1). "{A}ny divergence between the values established using the Ministerial specification and the values which would have been calculated had the information been provided should not benefit the exporter. . . . Normal values of the goods will be based on the export price determined under section 24 or 25 of SIMA plus an amount equal to the highest margin of dumping (expressed as a percentage of the export price) found for the final determination from exporters who were required to provide information and who fully complied with the Department's request for information." SIMA Handbook Inserts at 5.12.2; *see Final Determination — Cold-Rolled Steel Sheet — Statement of Reasons*, AD/1198 (July 28, 1999) (exporters with incomplete responses received the "highest margin of dumping found among all cooperating exporters to the investigation); *Final Determination — Hot-Rolled Steel Sheet — Statement of Reasons*, AD/1210, para. 5 (June 1, 1999) (exporters with incomplete responses received the "highest margin of dumping, for a cooperating exporter").

[146] *See, e.g., Polyvinyl Chloride Homopolymer Resin from Hungary, Indonesia, Korea, and Singapore*, Report No. 10 at para. 7.3.3 (10/5/99) (The Australian Customs Service calculated normal value for non-cooperating exporters pursuant to 269TAC(6) using cost information from a cooperating manufacturer adjusted for certain costs, including freight, and credit terms. In so doing, Customs noted that the resulting normal values are "higher than they might otherwise have been.").

[147] *Cotton Yarn from Pakistan*, Official Gazette (Kampo) No. 1702 (8/4/96) Extra Edition (Gogai) No. 147 (The dumping margin for non-cooperating parties was calculated by deducting the lowest export price among the cooperating suppliers found to be dumping from the weighted average normal value among the cooperating suppliers. This methodology yielded a margin (*i.e.*, 9.9 percent) that exceeded the highest margin calculated for a cooperating party (*i.e.*, 7.9 percent)) (English language translation) **(Exh. US/B-19A)**; *see also World Competition: Law and Economics Review*, v. 21, no. 1 at 35 (1997) (describing the *Cotton Yarn from Pakistan*

European Community,[150] Mexico,[151] Panama,[152] and Uruguay[153] specifically sanction the use of information contained in the request for initiation and other information submitted by the domestic industry as facts available. It is recognized that information submitted in a request for initiation is likely to be adverse to the interests of the responding party.

### F. Japan's Interpretation of Article 6.8 and Annex II Must Be Rejected Because it Would Nullify Those Provisions

73. In a strained effort to deny investigating authorities the ability to make adverse inferences about uncooperative respondents, and yet preserve *some* force for Article 6.8 and Annex II, Japan

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determination) **(Exh. US/B-19B)**.

[148] WTO Doc. G/ADP/N/1/BRA/2, Decree No. 1602 (8/23/95) at Art 66.1 ("The party shall be advised that if the information is not submitted within the specified period of time, it will imply that determinations will be made based on the facts available, including those contained in the request for initiating the investigation.").

[149] WTO Doc. G/ADP/N/1/ECU/1/Suppl.1, Rules and Procedures Art. 37 ("When the investigating authority requires the participation of the applicant or an interested party in order to verify information provided for the investigation in good time and in proper form, it shall inform him thereof in advance. If he does not agree to verification, the information provided by the other party shall be deemed to be correct, unless there is evidence to the contrary.").

[150] WTO Doc. G/ADP/N/1/EEC/2/Suppl.1, Council Reg. (EC) No. 2331/96 (2/12/96) Art. 18(5) ("If determinations, including those regarding normal value, are based on the provisions of paragraph 1, *including the information supplied in the complaint*, they shall, where practicable and with due regard to the time-limits of the investigation, be checked by reference to information from other independent sources which may be available, such as published price lists, official import statistics and customs returns, or information obtained from other interested parties during the investigation.") (emphasis added).

[151] WTO Doc. G/ADP/N/1/MEX/1, Foreign Trade Act Art. 83 ("Information and evidence submitted by the interested parties may be verified in the country of origin if the interested parties so agree. Without their consent, the Ministry shall assume that the requesting party's claims are true, unless there exist elements which indicate otherwise.").

[152] WTO Doc. G/ADP/N/1/PAN/1, Law 29 of 1996 Art. 157 ("When the authorities of the exporting country or the interested parties deny access to the necessary information, refuse to provide such information within a reasonable time-period or seriously impede the investigation, preliminary or definitive conclusions may be reached on the basis of the facts available, including those appearing in the application for the initiation of the proceedings submitted by the domestic industry or production.").

[153] WTO Doc. G/ADP/N/1/URY/2, Law No. 16671 (12/13/94) Art. 120 ("{I}f the information is not supplied within the specified time, the implementing authority may make its determination on the basis of the facts available, including those contained in the application for the initiation of the investigation.").

concedes that the result of not cooperating may be less favourable to a respondent than cooperating *where that is an accident*. According to Japan, the authority to make inferences that may be adverse is limited to situations where the investigating authority is attempting to select neutral gap filler,[154] but, owing to the imperfections in the data, selects data that coincidently turned out to be adverse. But Japan insists that investigating authorities could never intentionally select data presumed to be adverse as a means of inducing a respondent to cooperate.[155]

74. There are two fundamental flaws in this argument. First, there is no such limitation in the language of Paragraph 7 of Annex II. The last sentence of that paragraph says that "{i}t is *clear*, however," that a failure to cooperate "could lead to a result that is less favorable to the party than if the party did cooperate" (emphasis added). That sentence does *not* say that "although failure to cooperate will normally lead to the application of neutral gap-filler, respondent parties should nevertheless be advised that some of this neutral gap-filler may, coincidently, contain some information that turns out to be adverse to such parties." If that had been what the Member States intended, there would have been no need to emphasize (by stating that it "is clear") that the result of failing to cooperate could be adverse. Indeed, there would have been no need for the warning at all.

75. Second, Japan's nominal concession would virtually eliminate any incentive for respondent parties to cooperate. The remnant of the actually-intended incentive that Japan would allow would be that, if respondents did not cooperate, the neutral gap-filler applied to them might, by accident, contain some data that was adverse. However, the likely consequence of refusing to cooperate would not be adverse at all. Even if some of the data accidently turned out to be adverse, the effect on the margin would likely be small.

76. In consequence, a respondent would stand to profit substantially by generally withholding unfavorable information. The probable result would be that only a small percentage of the information withheld would be replaced by other unfavorable information. Most of the information withheld would be replaced by "neutral" gap-filler (in reality, information favorable to the respondent).[156] Thus, the incentive to cooperate would be minimal, at best. This result is

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[154] *Id.*

[155] First Submission of Japan at paras. 57-60.

[156] A neutral number would be an average number. With much of the data withheld any "average" nuber would, in practice, be an average of the remaining, favorable, numbers.

hardly surprising--Japan has explicitly acknowledged that its purpose is to eliminate any incentive that exporting respondents have to cooperate.[157]

77. Japan's reliance on the *Atlantic Salmon* GATT panel decision[158] for the proposition that the Agreement does not permit a purposeful selection of adverse facts available is also misplaced. In that case, Commerce selected a sample group of seven salmon farms to calculate a single cost of production that would then be used industry-wide for most of the exporters under investigation. One of the seven farms failed to produce complete cost information. Commerce rejected that farm's reported costs, and as facts available for that farm's costs, used the highest reported cost information from among the other six farms.[159]

78. On review, the GATT panel rejected Commerce's selection of facts available, *not* because it was adverse as to the farm in question, but because it would be used to determine a single average cost of production in Norway. As the Panel stated:

> The actual verified costs of production per kg. for the six remaining farms in the sample differed significantly and the imputation of the highest of these figures to the {seventh farm} had a significant impact on the average cost of production figure. Given that the sample was used by the Department of Commerce to compute a single average "cost of production in the country of origin" figure to be included in the calculation of the constructed normal values of most of the exporters under investigation, the Department should have considered how its choice of "the fact available" for determining the costs of production of {the seventh farm} would affect the representativeness of the results of the sample.[160]

As can be seen, the decision in *Atlantic Salmon* was based solely on the fact that the facts available information selected was used to calculate a single, average cost of production, applicable to many other exporters. Japan is therefore incorrect when it suggests that this case stands for the proposition that facts available can only be used to "fill gaps in information in a

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[157] First Submission of Japan at para. 59.

[158] *United States-Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, 30 Nov. 1992 (hereinafter *Atlantic Salmon*)(involving Article 6.8 of the (Tokyo Round) Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, GATT, 26th Supp. BISD 171-88 (1980)).

[159] *Id.* at paragraph 449.

[160] *Id.*

manner consistent with existing data."[161] In *Atlantic Salmon*, the Panel did not reject the principle that adverse inferences may be drawn where appropriate.[162]

79. Finally, Japan's argument that the use of an adverse inference is punitive is without merit. The WTO Appellate Body has stated that an adverse inference drawn from a party's failure to produce information is not punitive, but "merely an inference which in certain circumstances could be logically or reasonably derived by a panel from the facts before it."[163] As we have noted, that inference is simply that the information was withheld precisely *because* it was unfavorable to the party that withheld it - - a perfectly reasonable conclusion. Moreover, as noted, the same WTO Appellate Body has recognized that the adverse inference tool is necessary to create an incentive for parties appearing before a tribunal (or, as in this case, the investigating authority) to participate in the information gathering process.[164] The Commerce decisions cited by Japan discuss the need for that incentive and are the result of no more than the application of this fundamental principle.

## II. The Department's Partial Adverse Facts Available Determination with Regard to Kawasaki Steel Corporation ("KSC") Was Consistent with Article 6.8 and Annex II of the Agreement, as well as with Article 2.3 of the Agreement

80. The Department's determination to apply partial adverse facts available to Kawasaki Steel Corporation ("KSC") for failing to act to the best of its ability to provide necessary information regarding the sales through its U.S. affiliate, California Steel Industries ("CSI"), was consistent with Article 6.8 and Annex II of the Anti-dumping Agreement. Commerce's application of facts available to KSC was partial because KSC was cooperative as to the majority of its sales to the United States, which were simple export price sales to unaffiliated buyers in the United States and did not have to be constructed. Nevertheless, for those sales through CSI which did require construction and for which KSC was non-cooperative, Commerce used data drawn from KSC's own reported, verified sales information for its export price sales. Commerce applied the second-

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[161] First Submission of Japan, at para. 58.

[162] Moreover, the Panel in *Atlantic Salmon* addressed a claim made under Article 6.8 of the Tokyo Round Antidumping Agreement, which did not include Annex II. Thus, any interpretation of Article 6.8 under that Agreement is of only limited value. Under the current Agreement, the provisions of Annex II must be observed in the application of Article 6.8. As detailed above, Article 6.8 and Annex II together clearly contemplate the use of adverse facts available by administering authorities.

[163] *Civilian Aircraft,* WT/DS70/AB/R at para. 200.

[164] *Id.* at para. 204.

highest product-specific margin calculated for these reported, verified sales as the margin for KSC's sales through CSI. As a result, KSC's overall anti-dumping margin likely was less favorable to it than if it had cooperated with Commerce in the investigation.

81. Japan's arguments that Commerce's facts available determination as to KSC was inconsistent with the Agreement are based on incomplete factual information and a misreading of the relevant provisions of the Agreement. Based on all of the record evidence that was before Commerce in the investigation, its determination that partial adverse facts available should be applied to KSC is fully consistent with the applicable provisions of the Agreement.

### A. The Full Record Evidence Shows that Commerce Properly Determined that KSC Failed to Act to the Best of Its Ability to Report the Requested Data for the U.S. Sales through Its Affiliate, CSI

#### 1. Japan's first submission withholds, omits, and ignores critical factual information

82. In its first submission to the Panel, Japan has withheld, omitted, and ignored critical factual information regarding KSC's relationship with its U.S. affiliate, CSI, and its joint venture partner, CVRD. This information is essential to a full understanding of the steps that KSC could have taken to obtain and report the sales and further manufacturing cost information Commerce requested in order to construct export price ("CEP") for KSC's U.S. sales through CSI.[165] In fact, the full record evidence shows that KSC failed to exercise rights and powers that were readily available to it to report the requested information and, therefore, that KSC failed to cooperate to the best of its ability.

83. Japan lays the blame for KSC's failure to report the information requested by Commerce at the feet of its CSI joint venture partner, CVRD – and, in particular, Lourenço Gonçalves, a former employee of CVRD's partial owner, CSN.[166] During the investigation, Mr. Gonçalves was

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[165] In calculating constructed export price, or "CEP," Commerce begins with the price at which imported products are first resold to an independent buyer in the United States, in accordance with Article 2.3 of the Anti-dumping Agreement and pertinent U.S. legislation. This price is then adjusted to account for certain expenses that are incurred, including the costs associated with further manufacturing performed prior to the sale to the unaffiliated customer. It is this information, the prices for CSI's sales to unaffiliated customers and CSI's further manufacturing cost information, which was not provided in this case. *See also* the Statement of Facts above, regarding Commerce's application of facts available to KSC.

[166] First Submission of Japan at para. 65. CSN is a Brazilian steel producer and respondent in the companion investigation of hot-rolled steel from Brazil. KSC Letter to Commerce at 2, (November 10, 1998)

CSI's President and CEO and the person responsible for purportedly "stonewalling"[167] KSC's efforts to obtain the requested information from CSI. So powerful was he – according to Japan – that KSC never bothered to go beyond making requests to him for the CSI information.

84. The factual information presented by Japan in support of its claims, however, is entirely one-sided. It omits the considerable power which KSC, as half-owner of CSI, held over that company through the structure of the corporation and its Board of Directors. This power is demonstrated through the CSI Shareholders' Agreement, which delineates the legal relationship between the shareholders and their relationship to CSI, as well as through information which Commerce officials gathered in discussions with KSC officials at verification in Japan. While some of this information is business confidential information that Japan has chosen to release under WTO protection for this proceeding, the United States has not yet obtained consent from KSC, through Japan, to release other parts of this information.[168] In particular, KSC has thus far not agreed to release, under WTO protection, the minutes of three critical CSI Board of Directors meetings and the confidential portions of the KSC sales verification report and Commerce's analysis memorandum regarding CSI.[169] It is essential that in reaching its decision here, the Panel consider all of the evidence that was before Commerce in its investigation. Accordingly, all such evidence must be released by Japan for consideration by the Panel.[170]

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**(Exh. JP-42(i))**.

[167] *Id.* para. 67.

[168] Pursuant to Article 6.5 of the Anti-dumping Agreement, permission to disclose business confidential information must be sought from the specific party submitting the information. In this instance, that is KSC, who referred the Department to Japan about this matter. Japan has referred the Department back to KSC. *See* Letter from Department to Japanese Embassy re: BCI (July 18, 2000) **(Exh. US/B-20)**.

[169] California Steel Industries ("CSI") Minutes of 1998 Board of Directors Meetings (hereinafter "CSI Board Minutes") (business confidential information redacted) **(Exh. US/B-23)**; KSC Verification Report (March 30, 1999) (showing business confidential information redacted) **(Exh. US/B-21) (redacted version at Exh. JP-42(y))**; and *Analysis Memorandum: Kawasaki Steel Corporation -California Steel Industries* (hereinafter "*KSC Final Analysis Memo*") (April 28, 1999) **(Exh. US/B-22)**. Japan has included the CSI Shareholders' Agreement **(Exh. JP-42(aa))**, with a request for BCI treatment as to its contents. All of the foregoing documents were in Commerce's administrative record for the investigation and all of the business confidential information in them has been released to counsel for petitioners and respondents pursuant to Commerce's administrative protective orders as well as the U.S. Court of International Trade's judicial protective orders in parallel litigation pending with respect to this matter.

[170] The confidential information for which we have not yet obtained consent for release is double-bracketed and omitted in this submission.

### 2. The full record evidence shows that KSC failed to act to the best of its ability

85. The full record evidence that was before Commerce in its investigation here demonstrably shows that KSC failed to act to the best of its ability to provide Commerce with the necessary information to calculate CEP for KSC's sales through CSI. Commerce repeatedly made requests to KSC, and KSC repeatedly refused, to supply this information. Commerce's verification of KSC then confirmed KSC's failure to cooperate.

86. Commerce requested the relevant sales and further manufacturing cost information from KSC no less than three times. And on three separate occasions, KSC requested that it be excused from reporting such information.[171] Finally, on January 25, 1999, instead of responding to Commerce's third request for the CSI information, KSC stated that it was unable to do so because CSI, which was also a petitioner in the anti-dumping proceeding, refused to cooperate. However, based on its analysis of the evidence on the record, Commerce found in its preliminary determination that KSC had failed to cooperate to the best of its ability to provide the requested information and that this failure justified the application of partial adverse facts available.

87. Commerce conducted a thorough examination of KSC's efforts to obtain the CEP sales data at verification in Japan in late February and early March of 1999.[172] This included meeting with the involved KSC officials and reviewing the relevant corporate documents, including the minutes of CSI Board of Directors meetings, in order to take into account any and all efforts KSC made to obtain the data. These inquiries showed that although KSC had made written and oral requests to CSI for the data, KSC had failed to employ the numerous means at its disposal to obtain those data. Specifically, KSC never raised the issue before the CSI Board, never attempted to enforce its rights with respect to this matter under the CSI Shareholders' Agreement, and never discussed the matter directly with officials at its joint venture partner, CVRD.[173]

88. As an initial matter, Japan claims that the CSI Shareholders' Agreement "is irrelevant to the question presented by USDOC's action under the Anti-Dumping Agreement."[174] However, the Shareholders' Agreement is the only objective evidence on the record that shows how CSI

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[171] *See* Statement of Facts, above, regarding KSC.

[172] KSC Verification Report **(Exh. JP-42 (y)) (Exh. US/B-21)**.

[173] *LTFV Final Determination*, 64 Fed. Reg. at 24368 **(Exh. JP-12)**; *KSC Final Analysis Memorandum* at 3-4 **(Exh. US/B-22)**.

[174] First Submission of Japan at para. 68.

operated and was governed internally. It therefore represents crucial evidence of the steps that KSC could have taken to obtain and report the information requested by Commerce regarding KSC's sales through CSI. Japan's astonishing assertion that the Shareholders' Agreement is "irrelevant" here and the failure on the part of Japan even to address the provisions of the Shareholders' Agreement are a true reflection of the lack of merit and credibility in its claims.

89. The record evidence shows that KSC and CVRD, through their respective holding companies, each own 50 percent of CSI and have an equal number of votes in decisions made at shareholder meetings.[175] Moreover, at all relevant times, the Board of Directors of CSI consisted of [ ]. In other words, KSC [ ].[176]

90. Through its [ ]. Indeed, Article [ ][177] Article [ ][178] In addition, under Articles [ ].[179] Thus, Japan's claim that CSI's President and CEO, Lourenço Gonçalves, was CVRD's "man" and that KSC lacked any ability to control his actions at CSI is belied by express provisions of the Shareholders' Agreement itself.

91. Despite [ ]. KSC failed to have [

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[175] CSI Shareholders' Agreement (**Exh. JP-42(aa)**).

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.*

].[180] KSC's [
]. Indeed, at CSI's regular Board meeting on [[

]].[181]

92. KSC's Board representatives at CSI also [

]. Again, at CSI's regular Board meeting on [[
]].[182]

93. In addition to the foregoing, Article [
].[183] Nevertheless, KSC never attempted to enforce [
]. Indeed, there is no evidence on the record that KSC even invoked [
]. But even if it could be argued that KSC invoked [ ] by simply requesting information from CSI, it acquiesced in CSI's failure to provide the requested information and did not make any attempt to enforce [ ].

94. Furthermore, despite the [ ] history of cooperation and partnership between KSC and CVRD,[184] KSC itself acknowledged to Commerce during the investigation here that it never even discussed the anti-dumping investigation or the lack of cooperation it was receiving from CSI officials with CVRD.[185]

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[180] Under [
]. *Id.*

[181] CSI Board Minutes **(Exh. US/B-23)**.

[182] *Id.*

[183] CSI Shareholders' Agreement **(Exh. JP-42(aa))**.

[184] *See id.*

[185] KSC Verification Report at 22 **(Exh. JP-42(y))** **(Exh. US/B-21)**.

95. KSC's sole claim with respect to the issue of whether it acted to the best of its ability is that CSI's President and CEO Gonçalves and, "by extension," CVRD failed to cooperate in KSC's attempts to obtain the information requested by Commerce. However, KSC's assertions do not and cannot show that requesting cooperation from Mr. Gonçalves was equivalent to requesting cooperation from CVRD. In fact, the provisions of the Shareholders' Agreement and the record evidence here show otherwise. Moreover, this claim is directly refuted by KSC's own admission to Commerce during the investigation that it had failed to discuss this matter with CVRD. Thus, despite KSC's attempts to show otherwise, it inexplicably failed to ask for assistance even from CVRD in solving a problem with a company they jointly own and control.

96. There is nothing on the record indicating that KSC would have encountered any opposition from CVRD if KSC had directly requested CVRD's assistance in obtaining the information requested by Commerce regarding KSC's sales through CSI. Nevertheless, even if KSC had explicitly requested such cooperation and been refused, KSC had at its disposal [ ]. In the event of a deadlock between KSC and CVRD, [ ] to resolve the dispute.[186] [ ].[187]

97. In sum, KSC made no attempt either to exercise any of the contractual rights and powers available to it under the Shareholders' Agreement or to work with its joint venture partner, CVRD, to obtain the information requested by the Commerce Department. As the Department summarized:

> While the Department has considered that the record supports KSC's claim that it did make some effort to obtain the data and that CSI's management rebuffed these efforts, the record also shows that KSC essentially acquiesced in CSI's decision not to provide this data. Given KSC's relationship with this 50/50 joint venture, as detailed in the *Home Market Sales Verification Report*, dated March 26, 1999, this did not constitute making its best efforts to obtain the data.[188]

98. Based upon a proper establishment of all of the facts and an unbiased and objective assessment of those facts, Commerce reasonably determined that KSC failed to cooperate to the

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[186] CSI Shareholders' Agreement **(Exh. JP-42(aa))**.

[187] *See id.*

[188] *LTFV Final Determination*, 64 Fed. Reg. at 24368 **(Exh. JP-12)**. *See also KSC Verification Report* at 20-23 **(Exh. JP-42(y)) (Exh. US/B-21)**.

best of its ability to produce the necessary information for Commerce to calculate CEP for KSC's sales through CSI. Accordingly, as set forth below, the Department's use of an adverse inference in selecting facts available for those sales is fully consistent with the Anti-dumping Agreement.

### B. Commerce's Determination that Partial Adverse Facts Available Were Warranted for KSC's Sales through CSI Is Consistent with Article 6.8 and Annex II of the Agreement

99. Given the facts when fully set forth, Commerce acted consistently with the Anti-dumping Agreement both in applying facts available to KSC's sales through CSI and in employing an adverse inference in selecting facts available for those sales.

100. As detailed in the section above defending Commerce's facts available practice generally, Article 6.8 of the Agreement permits the application of facts available for a party's failure or refusal to provide necessary information in an anti-dumping investigation. Annex II of the Agreement then sets out the criteria which investigating authorities must meet before drawing an adverse inference and applying less favorable information to parties which do not provide necessary information. As we have explained, taken together, Article 6.8 and Annex II of the Agreement allow investigating authorities to draw an adverse inference and apply less favorable information to a party that fails to act to the best of its ability to provide requested information. These provisions of the Agreement provide investigating authorities with a logical method for calculating anti-dumping margins when information is missing because parties either refuse access to it or otherwise do not timely provide it. In such situations, authorities cannot calculate margins out of thin air; instead, they are authorized by Article 6.8 to use facts available and, if necessary, to draw an adverse inference.

101. When all of the facts of record are examined here, as set forth above, it is clear that KSC failed to act to the best of its ability by taking the steps readily available to it to obtain and report the requested information regarding its CEP sales through CSI. Thus, Commerce's determination to apply facts available was consistent with Article 6.8 of the Agreement, and its drawing of an adverse inference through the use of "less favorable" information was consistent with Annex II of the Agreement.

### C. Japan's Arguments Lack Any Support in the Applicable Provisions of the Anti-dumping Agreement or in the Facts and Should Be Rejected by the Panel

102. Japan's arguments attacking Commerce's application of facts available to KSC are based on a misreading or mischaracterization of the applicable provisions of the Agreement and, once again, ignore critical information. Accordingly, these arguments must fail.

### 1. Commerce did not violate any duty to provide assistance to KSC

103. Japan makes the incredible claim that Commerce should have held KSC's hand by advising it of methods to obtain information from its own affiliate. In support of this argument, Japan has cited Article 6.13 of the Agreement, but it has conveniently omitted that provision's specific reference to "small companies."[189] Article 6.13, in its entirety, provides: "The authorities shall take due account of any difficulties experienced by interested parties, *in particular small companies*, in supplying information requested and shall provide any assistance practicable." (emphasis added) Of course, in cleverly deleting the reference to small companies in Article 6.13, Japan is suggesting that the provision is not necessarily limited, in its application, to such companies. While facially correct, Japan's reading of the text totally disregards the provision's primary aim: that it be given particular force and effect with regard to small companies. This is logical, since small companies are normally the parties needing assistance from investigating authorities in highly complex and technical anti-dumping proceedings.

104. KSC certainly is not a small company. Its sales revenue for fiscal year 1998 was more than $9 billion. Thus, Japan's suggestion that one of its largest corporations and one of the biggest steel producers in the world -- represented and advised by highly sophisticated and experienced U.S. trade counsel -- needed the help of the U.S. Commerce Department in divining how to manage its internal commercial relations with its half-owned affiliate and its Brazilian joint venture partner is astonishing.

105. Furthermore, Commerce had no responsibility or obligation to advise KSC to take the obvious steps that were available to it to obtain the information requested for its CSI sales, including contacting CVRD, its joint venture partner of more than [ ] years. There was no uncertainty as to the information requested; Commerce had met its obligation to make that clear. Yet Japan seems to expect that Commerce officials should have acted, in effect, as KSC's own lawyers, by advising them of all legal means, however obvious, of attempting to obtain the requested information. Any such interpretation of Article 6.13 of the Agreement is absurd and, therefore, should be eschewed by the Panel.

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[189] First Submission of Japan at para. 75, quotes Article 6.13 as follows: "The authorities shall take due account of any difficulties experienced by interested parties . . . in supplying information requested and shall provide any assistance practicable."

106. In any event, KSC never asked for Commerce's assistance in the investigation in any respect. Specifically, KSC never asked Commerce what steps it should take to obtain the information regarding its sales through CSI and never asked Commerce whether it could report the requested information in another form or suggested such other form. Indeed, rather than asking for Commerce's assistance, KSC asked to be excused altogether from reporting the requested information.[190]

107. In sum, Japan's argument that Commerce acted inconsistently with Article 6.13 of the Agreement is belied by the facts and unsupported by any but the most strained and illogical reading of that provision. It should, therefore, be rejected by the Panel.

### 2. Commerce appropriately applied an adverse inference because KSC "withheld" the requested information.

108. Japan's contention that KSC did not "withhold" any information from Commerce and that an adverse inference should not, therefore, have been applied against it under Annex II of the Agreement is likewise belied by the facts. As Commerce found, KSC withheld the information requested regarding its sales through CSI because it did not take steps readily available to it to obtain and provide that information. In this regard, Japan's contention that "KSC did not have any control legally or in fact over the information without the voluntary cooperation of its contractual partner CVRD" is unsupported by the evidence, when fully disclosed, as discussed above. Specifically, there is no record evidence that there was any lack of cooperation on the part of CVRD with respect to obtaining the requested CSI data. In fact, KSC never even discussed the matter with CVRD. Moreover, KSC did not use the rights and powers granted to it by the Shareholders' Agreement to obtain and report the information that had been requested. In sum, the facts on the record here show that KSC withheld information from Commerce that was within its power to produce, and Commerce therefore properly applied an adverse inference under Annex II of the Agreement. Japan's argument to the contrary should be rejected.

### 3. Commerce exercised circumspection, taking all circumstances into account, in its choice of facts available.

109. Japan further argues that "USDOC failed to exercise 'special circumspection' when it chose which *secondary sources* to use as facts available."[191] As demonstrated below, however,

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[190] *See, e.g.*, Letter from Howrey & Simon to the Honorable William M. Daley (November 10, 1998) **(Exh. JP-42(i))**.

[191] First Submission of Japan at 26 para. 80 (emphasis added).

the requirement in the Agreement to apply "special circumspection" in making determinations based on information from "secondary sources" did not even apply here because Commerce relied on KSC's own reported data in selecting the facts available to apply for KSC's sales through CSI. And even assuming that this requirement did apply, Commerce certainly exercised appropriate circumspection in its selection of facts available to apply to KSC.

110. Annex II, paragraph 7, of the Agreement requires investigating authorities to use "special circumspection" in selecting facts available only when they base their determinations on information from "a secondary source, including the information supplied in the request for the initiation of the investigation." In selecting facts available to apply to KSC for its sales through CSI, Commerce did not base its determination on information from "a secondary source." Rather, as facts available, Commerce applied the margin it calculated for other U.S. sales within the mainstream of KSC's transactions using the company's own verified data.[192] Because Commerce did not use information from "a secondary source" in making its determination here, the requirement of "special circumspection" was not even applicable.

111. Nevertheless, even assuming that the requirement of "special circumspection" did apply, Commerce plainly satisfied this requirement.

112. Specifically, as facts available for the sales through CSI, Commerce chose the second-highest product-specific margin for KSC's reported, verified sales, drawn from KSC's reported sales to unaffiliated buyers in the United States, which represented [[ ]] percent of all of KSC's sales. In its preliminary determination, Commerce had chosen the highest product-specific margin for KSC. However, in the final determination, Commerce rejected this as not within KSC's mainstream sales and opted instead for what Commerce considered to be a more reasonable choice of the highest margin for a product for which there were sales in substantial commercial

[192] *See LTFV Final Determination*, 64 Fed. Reg. at 24369 (**Exh. JP-12**).

quantities.[193] In deciding what rate to substitute for the missing CSI information, Commerce fully explained its rationale:

> For the final determination, the Department has used as adverse facts available the second highest calculated margin for an individual CONNUM {control number for a specific product}. ... In selecting the facts available margin for the final determination, we sought a margin that is sufficiently adverse so as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner. We also sought a margin that is indicative of KSC's customary selling practices and is rationally related to the transactions to which the adverse facts available are being applied. To that end, we selected a margin for a CONNUM that involved substantial commercial quantities and thus fell within the mainstream of KSC's transactions based on quantity. Finally, we found nothing on the record to indicate that the sales that we selected were not transacted in a normal manner.[194]

113. Commerce's selection of KSC's second-highest product-specific margin as adverse facts available is consistent with Annex II of the Agreement. The margin selection is based upon KSC's own verified data and upon sales well within the mainstream of KSC's transactions during the period of investigation. Moreover, the adverse inference drawn is directly proportionate to the magnitude of the failure to provide a complete response, i.e., the smaller the quantity of

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[193] In the Preliminary Determination, Commerce chose the highest margin from among KSC's reported U.S. sales. However, in the Final Determination , Commerce determined that the product for which this margin was calculated was not fully representative of KSC's U.S. sales. Commerce explained this change as follows:

> Although no party commented on the rate chosen as facts available in the preliminary determination, we have reexamined our choice for this final determination. In the preliminary determination, we used as the facts available margin the highest margin by CONNUM {control number for a specific product}. However, upon reexamining that decision, we find that the margin chosen was not sufficiently within the mainstream of KSC's sales in that the rate was derived from sales of a product that accounted for a very small portion of KSC's total sales as well as the highest rate by CONNUM.

*LTFV Final Determination*, 64 Fed. Reg. at 24369 (**Exh. JP-12**). Japan contends that Commerce's choice of the facts available margin was aberrant. First Submission of Japan at para. 69. To the contrary, as stated in the Final Determination, it was based upon a product within the mainstream of KSC's sales. Thus, Japan's citation to *Usinor Sacilor v. United States*, 872 F. Supp. 1000 (Ct. Int'l Trade 1994) is inapposite. *Id.*

[194] *LTFV Final Determination*, 64 Fed. Reg. at 24369 (**Exh JP-12**).

unreported sales, the smaller the impact and vice versa. In short, the outcome appropriately reflects the level of cooperation; it is not punitive but merely provides reasonable assurances that KSC did not benefit by failing to provide the information requested. Thus, any further step to reflect KSC's limited cooperation, i.e., the selection of a lower margin, is unnecessary and could result in KSC receiving a benefit from its failure to cooperate. Such a result would be inconsistent with the admonition to non-cooperating parties in paragraph 7 of Annex II that their failure to cooperate may result in a margin which is less favorable than if they did cooperate.

114. Japan's argument that Commerce failed to take into account the fact that the party withholding the information – CSI – actually benefitted from the application of facts available[195] is likewise incorrect. As an affiliated importer and reseller of a substantial amount of KSC hot-rolled steel, it was in CSI's best interests for KSC's margin to be as low as possible so that CSI could continue to purchase such merchandise from KSC without incurring the costs imposed by high anti-dumping duties. Additionally, any benefit from high anti-dumping duties being imposed on hot-rolled steel from Japan that may have been experienced by CSI as a U.S. producer of non-subject merchandise would also work to KSC's benefit as a 50 percent shareholder in CSI. Commerce fully considered these interests and properly concluded that sorting them out was not a fruitful exercise:

> We cannot reasonably predict or weigh the magnitude of effects this might or might not have on the parties involved. In this case, we can only ensure that KSC and CSI do not obtain a more favorable dumping margin on subject merchandise. As an affiliated importer and/or seller of KSC's subject merchandise, CSI will be affected by any margin assigned to KSC's exports of this merchandise. Neither KSC nor CSI will be rewarded with more favorable dumping margins. Any benefit accruing to CSI from its non-cooperation will flow not from its role as an affiliate-respondent, but from its role as a U.S. producer of non-subject merchandise. Furthermore, KSC, as a 50 percent shareholder in CSI, will share in any such benefit. In addition, we note that it is not the use of the adverse inference which allows KSC's U.S. affiliate to restrict the scope of data on the record – it is CSI's decision to withhold that data and KSC's decision to acquiesce in this posture. Neither KSC nor CSI should be relieved of the obligation to report data on sales through CSI in this or future proceedings. Thus, while KSC's business relationships may involve certain internal conflicts of interest, the use of an adverse

[195] First Submission of Japan at para. 80.

> inference in determining the dumping margins on CSI sales does not contradict the Department's policies.[196]

115. CSI's status as a petitioner in the investigation, while unusual, did not require Commerce to reach a different result here. KSC's representatives on the CSI Board of Directors [

].[197] KSC [

]. The only conclusion that may be drawn from these facts is that KSC, in effect, acquiesced in CSI's participation as a petitioner. Moreover, CSI's status as a petitioner did not relieve KSC from its responsibility to take all of the steps available to it to act to the best of its ability to provide the data necessary to calculate a dumping margin. Indeed, as Commerce explained in its final determination:

> Allowing a producer and its U.S. affiliate to decline to provide U.S. cost and sales data on a large portion of their U.S. sales would create considerable opportunities for such parties to mask future sales at less than fair value through the U.S. affiliate. The fact that the affiliate is a petitioner does not allay such concerns. Thus, this fact does not constitute an exception to the principle that the Department may make an adverse inference with respect to sales for which data is not provided unless the foreign exporter and its U.S. affiliate have acted to the best of their ability to provide such data.[198]

116. Lastly, Japan overlooks the fact that, in this case, Commerce's application of facts available was partial. This is not a case in which the Department applied facts available to all of KSC's sales -- *i.e.*, it did not apply "total" facts available. Instead, it recognized KSC's cooperation on [[ ]] of its sales and applied actual, calculated margins to those sales based on the verified data reported by KSC. It is only with regard to the CSI sales that the adverse inference has been applied.

117. In sum, Commerce permissibly interpreted Annex II of the Agreement and acted with "special circumspection" when it chose the second-highest of the margins calculated for KSC's reported, verified sales to apply to its sales through CSI. As a result, KSC's overall anti-dumping margin was likely less favorable to it than if it had cooperated with Commerce in the investigation.

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[196] *LTFV Final Determination*, 64 Fed. Reg. at 24368 **(Exh. JP-12)**.

[197] *See* CSI Shareholders' Agreement **(Exh. JP-42(aa))**.

[198] *LTFV Final Determination*, 64 Fed. Reg. at 24368 **(Exh. JP-12)**.

Such a result is not only permissible, but intended, under the facts available provisions of the Agreement; otherwise, firms could refuse to report sales with their highest margins with impunity, as long as they were "cooperative" as to their lower-margin sales.

### 4. Commerce's Application of Facts Available to KSC Was Completely Consistent with Article 2.3 of the Agreement

118. Japan concludes its attack on Commerce's determination with respect to KSC by arguing that the use of partial adverse facts available for KSC's sales through CSI was an "unreasonable surrogate for export price {that} constitutes a measure inconsistent with Article 2.3 of the Agreement governing the calculation of export price."[199] This argument is based on an incorrect and impermissible interpretation of Article 2.3 of the Agreement and should be rejected by the Panel.

119. Japan contends that, instead of applying the second highest margin for KSC's reported sales as facts available for KSC's sales through CSI, Commerce should instead have used some other methodology to determine a margin for the CSI sales.[200] Specifically, Japan claims that Commerce acted in a manner inconsistent with Article 2.3 of the Anti-dumping Agreement because it failed to calculate export price for the sales through CSI on a "reasonable basis."[201] Article 2.3 governs the construction of export prices for sales through U.S. affiliates like CSI and provides as follows:

> In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

120. It is clear from the face of Article 2.3 that, if the investigating authority considers the export price to be unreliable because of association, or affiliation, between the exporter and the importer – as with KSC and its half-owned affiliate, CSI – then the authority may construct the

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[199] First Submission of Japan at 26-27.

[200] *Id.*

[201] *Id.*

export price on the basis of the resale price to the first unrelated customer, or, if the product is not resold in the condition as imported – as is the case here because of CSI's further manufacturing of the imported product – then on such reasonable basis as the authority may determine.

121. Commerce adhered to the requirements of Article 2.3 for KSC's sales through CSI. In order for Commerce to have constructed the export price and have calculated an accurate dumping margin for KSC's sales through CSI pursuant to Article 2.3, it was essential for Commerce to have obtained CSI's price to the first unaffiliated customer for such sales as well as the further manufacturing cost information on those sales as requested in Section E of its Antidumping Duty Questionnaire. Nevertheless, KSC failed to provide any of the necessary sales data or further manufacturing cost data for the sales in question. By applying a product-specific dumping margin calculated for other U.S. sales to the sales through CSI, Commerce used facts available that allowed it to make the necessary calculations under the applicable provisions of the Anti-dumping Agreement.[202]

122. Commerce even considered, at the urging of KSC, whether to exclude CSI's sales pursuant to its "special rule" for further manufacturing. This rule allows the Department to base the margin for products further manufactured by an affiliate before sale in the United States on other sales of subject merchandise by the same exporter when "the value added by the affiliated person is likely to exceed substantially the value of the subject merchandise {when sold to the unaffiliated party}."[203] Commerce found that the value added by CSI's further manufacturing processes did not meet the threshold for the application of the "special rule."[204] Japan does not contest that finding.

123. Japan urges that "a logical step would have been for USDOC to request KSC's own prices to CSI and then test the data to see whether they were reliable or not."[205] In so doing, Japan once again ignores the facts on the record. Commerce did request, and KSC refused to

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[202] Japan cites *Atlantic Salmon* in support of the proposition that the right to apply facts available must be interpreted in conjunction with the relevant substantive provisions of the Anti-dumping Agreement. First Submission of Japan at para. 85. Commerce's application of facts available satisfies that standard here. As set forth above, Commerce's application of facts available for KSC's sales through CSI allowed it to make the necessary calculations under the applicable substantive provisions of the Agreement for those CEP sales. Thus, this application of facts available was fully justified and was consistent with the Agreement, and the decision in *Atlantic Salmon* does not require a different result.

[203] 19 U.S.C. § 1677a(e)(1).

[204] *LTFV Final Determination* at 24367 **(Exh. JP-12)**.

[205] First Submission of Japan at para. 84.

report, the transfer prices between KSC and CSI.[206] Instead, KSC provided an average transfer price between KSC and CSI.[207] This would be insufficient as a basis for comparison to KSC's sales to its non-affiliated customers because it was calculated on an aggregate basis, rather than on a sale-by-sale basis, and would not provide an accurate comparison. Thus, any argument that the transfer prices between KSC and CSI could be the basis for U.S. price on the CSI sales -- an approach which Commerce rejects -- is moot because KSC failed to report the transfer prices.

124. Japan further argues that by applying the second-highest product-specific margin calculated for reported sales as the margin for the CSI sales, Commerce "disregarded the existence of perfectly acceptable normal values . . . to which they could compare a surrogate export price . . ." calculated for the CSI sales.[208] This argument completely ignores the fact that Commerce could not have compared even surrogate export prices for the CSI sales to normal values calculated for home market sales because Commerce was never provided with the product characteristics, or any other data for that matter, for the merchandise imported by, and sold through, CSI. Without the product characteristics and the other details for the merchandise sold through CSI, there is no basis to compare those sales with home market sales for purposes of the margin calculation.

125. Japan essentially treats the "reasonable basis" language of Article 2.3 of the Anti-dumping Agreement like an independent facts available provision. However, if that were so, the drafters of the Agreement would not have bothered to specify rules for application of facts available in Article 6.8 and Annex II, including the "less favourable" language allowing an investigating authority to apply an adverse inference when a party has not cooperated to the best of its ability, in order to induce its cooperation. Thus, for all of the foregoing reasons, Japan's interpretation of Article 2.3 is completely erroneous.

126. In fact, if Japan's interpretation of Article 2.3 were to be adopted, this would invite manipulation. The exporter could shield all of its CEP sales from the reach of the anti-dumping law and price those sales at whatever level it desired. Such could not have been the intent of the drafters of the Anti-dumping Agreement.

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[206] *See* KSC Supplemental Section A Questionnaire at 2 (December 4, 1998) **(Exh. JP-42(k))**; KSC Supplemental Section A Response at 6-7 (January 19, 1999) **(Exh. US/B-24)**. *Cf.* Huey Affidavit at para. 27 **(Exh. JP-44)**, claiming that the Department did not perform any type of price comparison on the CSI sales, but omitting the fact that KSC did not provide the sales information to do such a comparison.

[207] *See* KSC Supplemental Section A Response at 6-7 (January 19, 1999) **(Exh. US/B-24)**.

[208] First Submission of Japan at para. 86.

127. In sum, Commerce's determination to apply partial adverse facts available to KSC for failing to act to the best of its ability to provide necessary information regarding its sales through its U.S. affiliate, CSI, was consistent with Article 2.3, Article 6.8, and Annex II of the Anti-dumping Agreement. Japan's further argument that Commerce's determination was inconsistent with Article 9.3 of the Agreement because the margin for KSC was excessive[209] is likewise in error, because Commerce correctly calculated KSC's margin in accordance with the applicable substantive provisions of the Agreement. For all of these reasons, the Panel should uphold Commerce's application of partial adverse facts available to KSC.

## III. The Department's Partial Adverse Facts Available Determinations with Regard to NSC and NKK Were Consistent with the Standards of the WTO Agreement

128. The Department's application of the facts available to NSC's and NKK's theoretical weight[210] sales for which they did not provide a theoretical-to-actual weight conversion factor within a reasonable period of time was based upon a permissible interpretation of the Agreement. Export sales and home market sales must be compared on a common basis. Because both NSC and NKK made export sales that would be compared to home market sales made on a different weight basis, the Department reasonably required them to provide a weight-conversion factor so that it could make its margin comparison on a common basis.

129. Article 6.8 and Annex II expressly provide that an authority may resort to the facts available if information is not supplied within a reasonable time. In questionnaires and supplemental questionnaires, the Department, with extensions, eventually gave both NSC and NKK a total of 87 days in which to provide a timely response to its request for conversion factors.

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[209] First Submission of Japan at paras. 88-89. Japan also contends that the Department violated Article 9 of the Agreement and Article VI:2 of GATT 1994 by applying facts available to create an unreasonable and punitive margin for KSC's downstream sales, relying upon *United States-Antidumping Act of 1916*, 31 Mar. 2000, WT/DS136/R, at para. 6.189. First Submission of Japan at para. 78. In fact, that panel decision interprets Article VI:2 to mean that, when faced with dumping from another country, Members must apply some form of antidumping duty rather than some other punitive measure. The Department's decision to apply facts available to determine a dumping margin for KSC's downstream sales was fully consistent with this interpretation. The Department did not take punitive measures against KSC; it simply applied the facts available to calculate a dumping margin in the face of an uncooperative respondent, as it was permitted to do by Article 6.8 and Annex II of the Antidumping Agreement.

[210] The "theoretical weight" of a steel coil is an estimated weight, based upon the dimensions of the product. In determining the price per metric ton of steel coil sold on a theoretical weight basis, the price of the coil is divided by the estimated weight for a coil of certain dimensions, which may vary from the actual weight of that coil. Thus, the price per ton (the basis of the antidumping margin comparison) may vary, depending on whether a coil was sold based on actual or theoretical weight.

This clearly was a "reasonable time." Yet NSC and NKK did not submit their conversion factors until February 22, 1999, almost four months after the Department's first request for this data on October 30, 1998 and nearly a month after the January 25, 1999 final due date for a timely supplementary questionnaire response.

130. Thus the Department's decision to reject these untimely submissions, and to use adverse facts available in determining margins for the affected sales given that NSC and NKK could have provided the factors when originally asked, had they acted to the best of their ability, was consistent with each and every provision Japan has relied upon with respect to this question.[211] NSC and NKK, which each twice declined to provide such factors, alleging that this was unnecessary and/or impossible, were given ample opportunity both to present this evidence, and to provide its explanations. When Commerce rejected their untimely-submitted factors, they were told the reason this information was not accepted, and allowed to make further legal arguments on this issue before the Department reached its Final Determination. These provisions reflect the understanding of the drafters of the Agreement that, given the complex international nature of these investigations, authorities need to give parties an opportunity to make their presentations, but also need to be able to proceed to their determinations despite inadequate responses by interested parties.

131. As explained above, the facts available provisions of the Agreement, including the provision that an adverse inference may be taken when a party does not cooperate in providing the information at issue, creates an important incentive for an exporter to respond to the Department's questionnaires in a complete and timely manner. The Panel in the *DRAMs* case, for example, recognized that the Agreement should not be interpreted in a manner which would render antidumping cases unmanageable.[212]

132. The principle at issue here is a simple one: the right, under the Agreement, for authorities to establish reasonable deadlines for submission of information and to use the facts available when a party does not provide a response to a questionnaire within those reasonable deadlines. Where, as here, a respondent first offers the requested data item long after the reasonable deadlines have passed for its submission, the Agreement does not compel the Department to accept and use the late-provided data. Similarly, the Agreement permits authorities to use an adverse inference in selecting from the facts available when a party has failed to act to the best of its ability to timely supply the requested information. The Agreement thus leaves it to investigating authorities to set

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[211] Japan has relied upon Articles 2.4, 6.1, 6.6, 6.8, 6.13, 9.3 and paras. 5 and 7 of Annex II of the Agreement.

[212] *U.S.-DRAMS* at para. 6.78.

and enforce deadlines for receiving information in keeping with their judgment as to when they need it, so long as they provide interested parties with a reasonable period in which to make their submissions. The interpretation proposed by Japan with respect to the use and selection of the facts available would render meaningless any Member's right to establish deadlines. This is an unacceptable result, and one not intended by the Agreement.

### A. The Department Permissibly Interpreted the Agreement to Allow for the Use of Facts Available When Information Requested in a Questionnaire Was Not Provided By the Established Deadline

133. When Commerce calculates a dumping margin, it compares U.S. and home market sales made on the same quantitative basis. For example, it does not compare a per-pound price to a per-kilo price without first converting them to the same basis. Thus, the Department's initial questionnaires instructed NSC and NKK that if they had made some sales of hot-rolled steel based on theoretical weight and others based on actual weight, they "must" provide a conversion factor "used to arrive at a uniform quantity measure" for purposes of price comparison and report the converted quantity for affected sales.[213]

134. Under Article 6.8, authorities may base a determination on "facts available" if an interested party "refuses access to, or otherwise does not provide, necessary information within a reasonable period . . . ." As detailed in our Statement of Facts, above, both NSC and NKK failed to provide the requested conversion factors in their initial questionnaire responses. Commerce again requested the data in its supplemental questionnaires, and again both respondents failed to provide the conversion factors in their supplemental responses. NSC's and NKK's belated attempts to submit the data, long after the due date for questionnaire responses had passed and even after the preliminary determination, does not constitute providing this information "within a reasonable period." Thus, Commerce was authorized, consistent with Article 6.8, to use the facts available in determining the margin for the affected sales.[214]

135. Article 6.8 also states that "{t}he provisions of Annex II shall be observed in the application of this paragraph." Neither Article 6.8 nor Annex II define "reasonable period."

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[213] Section B-E Questionnaire at B-19, C-17 (October 30, 1998) **(Exh. JP-45(a))**.

[214] Commerce's use of facts available was made pursuant to its authority under Section 776(a)(2) of the Act (19 U.S.C. § 1677e(a)(2) **(Exh. JP-4(k))**. Although Japan has challenged the Department's general practice with respect to use of adverse inferences and the consistency of its use of facts available in this case with the Agreement, it has not specifically challenged the statutory provision pursuant to which Commerce applied facts available.

Therefore, "reasonable period" must be interpreted "in accordance with the ordinary meaning to be given to the terms . . . in their context" and in light of the object and purpose of the Agreement.[215]

136. Paragraph 1 of Annex II reiterates the basis for the use of facts available found in Article 6.8: "The authorities should also ensure that the party is aware that *if information is not supplied within a reasonable time*, the authorities will be free to make determinations on the basis of the facts available . . . ." (Emphasis added.) The purpose of this sentence is to require investigating authorities to notify respondents of the consequences of a failure to submit requested information within the established deadlines. It clearly contemplates the use of facts available by authorities if that information is not provided within a "reasonable time." [216]

137. Paragraph 3 of Annex II discusses when an investigating authority should accept the information submitted by a respondent: "All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties ***and*** *which is supplied in a timely fashion*, . . . should be taken into account when determinations are made." (Emphasis added.) The meaning of this sentence is clear on its face. If the information supplied meets all of the listed criteria, then an investigating authority should accept it. However, there is no obligation to accept the data unless it was, *inter alia*, timely. Because the drafters listed separate and distinct criteria, all of which were required to be satisfied before authorities should accept the proffered data, it is clear that the fact that submitted information could be used "without undue difficulty" was not sufficient to compel the acceptance later in the proceeding of information that was not also "timely."

138. Thus, the term "reasonable period" in Article 6.8, interpreted in accordance with Annex II, contemplates a timely submission. A respondent that does not meet the reasonable deadlines imposed by the authorities may face rejection of any data that are submitted late. If that information is rejected on a permissible ground (*e.g.*, untimeliness), then the authority may resort to facts available.

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[215] Article 31(1) of the Vienna Convention on the Law of Treaties.

[216] It is undisputed that, consistent with the requirements of Paragraph 1 of Annex II, NSC and NKK were warned that failure to provide the information requested could result in the use of facts available. *See* NSC Supplementary Questionnaire at second page (unnumbered) of cover letter (January 4, 1999) **(Exh. US/B-13)**; NKK Supplementary Questionnaire at second page (unnumbered) of cover letter (January 4, 1999) **(Exh. US/B-14)**.

139. Because Article 6.8 requires that a party submit data within a "reasonable period," authorities should impose "reasonable" deadlines. As demonstrated below, the Department's deadlines were more than reasonable.

### B. The Department Provided "Ample Opportunity" for NSC and NKK to Furnish The Weight-Conversion Factors Requested in the Questionnaires

140. The Department's use of facts available for the sales affected by the weight-conversion factors also complies with the requirement of Article 6.1 that parties must be given "ample opportunity to present in writing all evidence they consider relevant in respect of the investigation in question."[217] NSC and NKK had ample opportunity to provide the conversion factors, which the Department requested both in the initial questionnaires and in supplemental questionnaires. NSC and NKK did not provide the conversion factors by the due dates contained in either of the questionnaires, and thus did not provide the factors within a "reasonable period."

141. The general requirement that parties have an ample opportunity to present evidence in Article 6.1 is clarified in Article 6.1.1, which provides that exporters or foreign producers must be given at least thirty days for reply to a questionnaire. Because Article 6.1.1 sets forth a specific requirement, it limits the more general language of paragraph 6.1. Thus, a respondent that has been given at least 30 days to respond to a questionnaire, has normally been given "ample opportunity" to present evidence with respect to the issues raised in that questionnaire.

142. NSC and NKK were given more than ample opportunity to respond to the Department's request for conversion factors. Both companies were given 52 days to respond to the original questionnaire. The questionnaire was issued on October 30, 1998, and NSC's and NKK's responses were ultimately provided on December 21, 1998, after the Department granted NSC and NKK's requests for a two-week extension beyond the original deadline.[218] After the Department had analyzed the initial questionnaire response, NSC and NKK were again asked for the same data in a supplemental questionnaire. Both companies were given 21 additional days to respond to the supplemental questionnaire. That questionnaire was issued January 4, 1999; NSC and NKK ultimately provided their responses on January 25, 1999, after the Department granted NSC and

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[217] *See* First Submission of Japan at paras. 116-119.

[218] *See* Letter from Program Manager to law firm of Gibson, Dunn & Crutcher (November 19, 1998) (granting extension to NSC) **(Exh. US/B-9)**, and Letter from Program Manager to law firm of Willkie Farr & Gallagher December 1, 1998) (granting extension to NKK) **(Exh. US/B-10)**.

NKK a one-week extension beyond the original deadline.[219] Between the Department's first request for the conversion factors in October of 1998 and the due date for the supplemental questionnaire, 87 days had elapsed. Thus, Commerce more than met the 30-day minimum amount of time stipulated for questionnaire responses in Article 6.1.1.

### C. The Department's Supplemental Questionnaires Afforded NSC and NKK Additional Opportunity to Further Explain, and Even Supplement, Their Prior Responses Consistent with Paragraph 6 of Annex II

143. Annex II, at paragraphs 1 and 3, makes it clear that authorities need only consider information "supplied in a timely fashion." If information "is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available." Paragraph 6 of Annex II echoes this concern for timely responses in the provision that "due account" must be taken of the time limits of the investigation.

144. Despite the fact that NSC and NKK did not provide the necessary conversion factors by the deadline for the original questionnaire, Commerce, in its supplemental questionnaire, afforded them a second chance to submit these conversion factors. By this second request for data, the Department more than complied with its obligations under paragraph 6 of Annex II.

145. Paragraph 6 of Annex II, requires that "{i}f evidence or information is not accepted, the supplying party should be informed forthwith of the reasons thereof and have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation." Paragraph 6 further requires that "{i}f the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations."

146. Paragraph 6 of Annex II requires that an investigating authority inform a respondent of the reasons evidence or information is not accepted and give a respondent an opportunity to provide further explanation within a reasonable period. The same provision also calls for the agency to provide, in its published determination, the reasons for the rejection of evidence or information it has not accepted. Commerce met all of these requirements. In particular, the Department's supplemental questionnaires put NSC and NKK on notice that their initial responses were inadequate because they neither provided the requested factor nor supported their claim that the factor was unnecessary, and gave both firms an opportunity to provide the necessary factor within

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[219] *See* Letter from Program Manager to law firm of Willkie Farr & Gallagher (January 7, 1999) (granting extension to NKK) **(Exh. US/B-25)**, and Letter from Program Manager to law firm of Gibson Dunn & Crutcher (January 15, 1999) (granting extension to NSC) **(Exh. US/B-26)**.

a reasonable period.[220] Paragraph 6 requires "an" opportunity to provide further explanation, not endless opportunities to do so.

147. With respect to NSC, which initially attempted to avoid the conversion factor issue by stating (incorrectly) that no such factor was necessary because "NSC quantity types are consistent within the product type,"[221] the supplemental questionnaire afforded an opportunity to examine the data on these sales more closely, and to correct its error by providing new evidence (the requested factor). Instead, NSC responded with another erroneous claim, that it had no way of calculating the requested factor.[222] Paragraph 6 of Annex II does not require the Department to recognize sequential errors and provide unlimited opportunities for new submissions.

148. NKK likewise responded to the initial questionnaire by stating (incorrectly) that no conversion factor was necessary because none of its home market theoretical weight sales would be matched to actual weight U.S. sales, but also added the claim that "it is not possible to convert a theoretical weight into an actual weight."[223] Commerce's supplemental questionnaire not only gave NKK the chance to further explain the claims it had made in the initial questionnaire response, but also to correct its erroneous answer and to provide new evidence (the requested factor). Commerce thus complied with the terms of paragraph 6 of Annex II. NKK chose to ignore this opportunity, and instead reiterated its position that a conversion factor was both unnecessary and impossible to calculate.

149. Paragraph 6 of Annex II does not require authorities to provide further opportunities to submit completely new information after respondents have twice failed to meet response deadlines and have asserted that the information requested cannot be provided. This is clear from the distinction in that paragraph that "explanations" (rather than further "evidence") may be provided when "evidence" or "information" is not accepted. Thus, although an authority should inform a respondent when evidence initially timely provided does not meet the necessary requirements, and should allow the respondent an opportunity to *explain* why that information should be accepted, paragraph 6 of Annex II does not require authorities to provide endless opportunities to submit evidence requested in a questionnaire at whatever point after the reasonable questionnaire response deadline the respondent may select. Thus, Commerce more than complied with its obligations

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[220] *See* NSC Supplementary Questionnaire at 2, (January 4, 1999) **(excerpts at Exh. US/B-13)**; NKK Supplementary Questionnaire at 5 (January 4, 1999) **(excerpts at Exh. US/B-14)**.

[221] NSC Initial Questionnaire Response at B-22 (December 21, 1999) **(excerpts at Exh. JP-29(a))**.

[222] NSC Supplementary Questionnaire Response at B-24-25 (25 January 1999) **(Exh. US/B-12)**.

[223] NKK Initial Questionnaire Response at B-30 (December 21, 1999) **(Exh. JP-45(b))**.

under the Agreement when it issued supplemental questionnaires to NKK and to NSC, allowing them another chance to provide conversion factors.

### D. Commerce Permissibly Rejected the Belated Conversion Factors and Used Adverse Facts Available Because NSC and NKK Failed to Act to the Best of Their Ability as Contemplated by Paragraphs 5 and 7 of Annex II, and by Articles 2.4 and 9.3 of the Agreement

150. The Department's use of facts available, including its use of an adverse inference, for the sales affected by the weight conversion factor was fully consistent with paragraphs 5 and 7 of Annex II, as well as with Articles 2.4 and 9.3 of the Agreement. Because NSC and NKK could have provided the information in a timely manner but did not do so, they failed to act the best of their ability and did not cooperate with the Department with respect to this information request. As a consequence, the Department was justified in rejecting the untimely data, and applying an adverse inference in its choice of facts available.

151. Paragraph 5 of Annex II states that "even though information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability." That NSC and NKK did not act to the best of their ability in not providing the conversion factors in response to the original and supplemental questionnaires is demonstrated by the fact that both companies were able to proffer such factors immediately after the issuance of the preliminary determination. Paragraph 5 does not require the acceptance of all submissions, at any time. Instead it calls for agencies not to require "ideal" information when respondents are unable to provide "ideal" information, despite their best attempts to do so. Commerce did not violate this provision by declining to accept the conversion factor NSC discovered it could indeed provide, after the preliminary determination and just before verification. Because NSC's and NKK's conversion factors were not rejected because of flaws in their quality (but rather because they were untimely provided) and because this information could have been timely presented had these firms acted to the best of their ability with respect to this issue, Commerce was not required to accept the information pursuant to paragraph 5.[224]

152. Paragraph 7 of Annex II states, "{i}t is clear, however, that if an interested party does not co-operate and thus relevant information is being withheld from the authorities, this situation could

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[224] Commerce also explained its reason for rejecting the factors that were belatedly provided by NSC and NKK in its Final Determination, stating that these submissions were rejected because they were untimely provided. *See* Letter from Program Manager to NSC at 3 (April 12, 1999) **(Exh. US/B-3(c))**; Letter from Program Manager to NKK (April 12, 1999) **(Exh. US/B-3(a))** and Letter from Program Manager to NKK (April 15, 1999) **(Exh. US/B-3(b))**; *see also LTFV Final Determination*, 64 Fed. Reg. at 24360-62 (NSC), 24363-64 (NKK) **(Exh. JP-12)**. Thereby, Commerce complied with paragraph 6 of Annex with respect to this rejected information.

lead to a result which is less favourable to the party than if the party did co-operate." NSC and NKK refused to provide conversion factors, despite repeated requests for the data. The evidence demonstrates that both companies had the ability to submit the data in a timely manner, but failed to do so. A party that fails to act to the best of its ability with respect to a given issue must be deemed to be noncooperative with respect to that issue.[225] No other interpretation of paragraph 7 would provide an investigating authority with an adequate tool to encourage complete and timely submissions of data. An investigating authority must have the ability to draw an adverse inference when a party fails to provide requested information in a timely manner. Without such a tool, respondent parties would have little incentive either to provide relevant data that might be unfavorable or to submit data within stated time limits. The Department's use of an adverse inference in this case was a permissible use of this tool.

### E. Japan Has Failed to Show That Commerce's Use of Partial Facts Available Was Inconsistent With Any Provision of the Agreement

153. Japan has not demonstrated that the Department's use of adverse facts available in determining the margins for NSC's and NKK's sales affected by their refusal to timely provide weight conversion factors violated any provisions of the Agreement. With respect to each cited provision of the Agreement, Japan's arguments fail to establish that the interpretation upon which the Department's decisions on this issue were based was impermissible. Indeed, as we demonstrate below, the interpretations which Japan urges upon the Panel are seriously flawed.

#### 1. The Department fully complied with Article 6.8 and with paragraphs 5 and 7 of Annex II

154. Just as Japan has failed to establish its newly-raised claim that the Department's general practice of making an adverse inference when it finds that a party has not acted to the best of its ability violates either Article 6.8 or the provisions of Annex II, it has also failed to establish that the Department violated those provision on the specific facts of this case.

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[225] The problem of selective data reporting to control the parameters of what data will be considered in calculating a margin is further illustrated by another area in which NSC also chose not to provide requested information. Contrary to the suggestion at para. 91 of the First Submission of Japan, the theoretical weight factor was not the only data with respect to which the Department was required to resort to the use of facts available during the investigation. NSC also declined to report, or expressly opted to report at an inadequate level of detail, product-specific costs for certain products, based on the stated (and incorrect) belief -- like that originally expressed with respect to its theoretical weight sales -- that the affected products would not be used in the margin-calculation process. *See LTFV Final Determination*, 64 Fed. Reg. at 24348 (Comment 14) **(Exh. JP-12)**.

### a. NKK and NSC did not submit their conversion factors "within a reasonable period" as required by Article 6.8

155. Japan does not deny that NSC and NKK's conversion factors were not submitted within the deadlines established for responding to the questionnaires in which these factors were requested. They do not deny that these deadlines were "reasonable" ones, or that they were even given extension of time in which to respond to these questionnaires. Thus, they have not demonstrated that the conversion factors, which were submitted for the first time long after the 87 days provided by Commerce's questionnaires,[226] were submitted within the "reasonable time" referenced in Article 6.8 of the Agreement.

156. Instead, Japan suggests that, in the context of some unspecified provision of the Agreement, authorities have an obligation to accept information first proffered long after a reasonable questionnaire deadline as long as it "plays a minor role," affects a small number of lines of computer code, and is presented in time to allow for verification.[227] Such an interpretation would make a mockery of questionnaire response deadlines, allow respondents to selectively withhold certain data until after the preliminary determination, and limit the ability of petitioners to comment on submitted data prior to the preparation of verification outlines. It is, therefore, at odds with the paragraphs 1, 3 and 6 of Annex II, all of which emphasize the importance of information being timely presented. Because this interpretation would render the timeliness requirement contained in Annex II meaningless, it is contrary to the customary rules of treaty interpretation.[228]

157. Japan's second argument, that the Department's regulations define a "reasonable period" for the submission of such information as seven days prior to verification,[229] is simply incorrect. The regulation upon which Japan relies, 19 C.F.R. § 351.301(b)(1), does not apply to data

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[226] As an initial matter, Japan is incorrect in characterizing NSC and NKK's belated submissions of conversion factors as simply "corrections" to previously submitted data. *See* First Submission of Japan at 29-39, *passim.* The conversion factors NSC and NKK submitted after the preliminary determination constituted completely new factual information, not a correction to a database they had previously provided.

[227] First Submission of Japan at paras. 99, 108.

[228] *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, p. 23 ("One of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.")

[229] *See id.*

requested in questionnaires. Section 351.301(b)("Time limits in general") begins with a preamble explaining that "Except as provided in paragraphs (c) and (d) of this section and § 351.302" factual information is due by the deadlines provided in section 351.301(b). Thus, section 351.301(b) is only a fallback provision for data for which other deadlines (such as those for questionnaire responses) do not take precedence. The Department explained in the Final Determination:

> Section 351.301(b)(1) of the Department's regulations provides generally that, in an investigation, factual information can be submitted up to seven days prior to verification. However, section 351.301(c)(2) states that "{n}otwithstanding paragraph (b)," when requesting information pursuant to a questionnaire, the Department will specify the deadlines by which the information is to be provided by the parties. ... Any information submitted after the deadline specified in the questionnaire is untimely, regardless of whether the general deadline in section 351.301(b) has passed.[230]

158. Finally, neither the inclusion in the Department's verification agenda outlines of an item relating to this issue nor the fact that verifiers examined aspects of NKK's conversion factor data at verification "ratifies the notion" that the conversion factors were timely submitted within the meaning of Article 6.8.[231] The NKK and NSC verification agendas were issued before either company submitted a conversion factor, and reflect the Department's interest in verifying NSC and NKK's assertions that it was impossible for them to provide such factors.[232] The conditional verification of NKK's factor data merely shows that there was an outstanding issue with respect to NKK's submissions at the time of verification, given that the verifiers were not authorized to make determinations with respect to rejection of submissions. Once that decision was made by appropriate authorities in Washington, they properly omitted references to the untimely submitted data from their report.

### b. Annex II, paragraph 5 does not mandate acceptance of the untimely provided conversion factors

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[230] *LTFV Final Determination*, 64 Fed. Reg. at 24361 **(Exh. JP-12)**.

[231] First Submission of Japan at paras. 99, 109.

[232] *See* NKK Sales Verification Agenda (February 16, 1999) **(Exh. JP-45(h))** and NSC Sales Verification Agenda (February 17,1999) **(Exh. JP-29(g))**. NSC and NKK first submitted their conversion factors on February 22, 1999. *See* Letter from Program Manager to NSC (April 12,1999) **(Exh. US/B-3(c))**, at 3; Letter from Program Manager to NKK, 12 Apr. 1999 and Letter from Program Manager to NKK (April 15,1999) **(Exh. US/B-3(a))**.

159. Japan's argument that paragraph 5 of Annex II compels the acceptance of NSC and NKK's untimely provided conversion factors fails because NSC and NKK did not "act to the best of their abilities" to provide the necessary conversion factors. That NSC and NKK supplied these factors as soon as the Preliminary Determination convinced them that it was in their immediate interest to do so shows that they could have done so earlier. The very claim that these firms submitted the factors "as soon as they became aware of their ability to do so" is an admission that, from the time of the first, evasive,[233] questionnaire response, they were "able" to provide the conversion factors.

160. NKK's original claims that, with respect to this unique issue, it was "impossible" to provide any conversion factor because it lacked the data to provide one derived from actual weights for the theoretical weight merchandise would be more believable had it not routinely demonstrated its ability to provide other requested information based on less-than-ideal underlying databases.[234] The premise that NSC was "unable" to discover prior to the preliminary determination that it did, in fact, weigh the steel coils sold on a theoretical weight basis is even more difficult to sustain. If huge, heavy steel coils are weighed anywhere, this would necessarily be done not at a Tokyo headquarters office, but at the production site. Because NSC did not ask the production facility whether it weighed the coils until the preliminary determination convinced it that this simple measure might yield a better result, NSC failed to act to the best of its ability to procure the information which enabled it to submit a conversion factor immediately after the Preliminary Determination.

### c. The Department's application of adverse facts available was consistent with Annex II, paragraph 7

161. Paragraph 7 of Annex II provides that, when information from a "secondary source" is used as facts available, "special circumspection" be exercised in the choice of such data. The second half of paragraph 7, however, tempers this concern by recognizing the "clear" corollary that when the need for the use of the facts available arises from the failure of an interested party to cooperate, the result may be "less favourable" to that party. The Department's decision to base its findings with respect to the theoretical weight sales on the facts available, and its use of an adverse

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[233] As described above, both companies had originally professed the belief that their theoretical weight sales would not affect the margin at all. In short, they were deemed "not worth the effort" to report on.

[234] *See, e.g.*, NKK's response at point 8 of its supplemental questionnaire response of February 23, 1999, at 3: "NKK does not track actual delivery charges for individual transactions. In order to provide movement expenses for each reported sales transaction, NKK allocated per metric ton average unit expenses to specific transactions based on the way in which the particular transaction was most likely to have been transported." **(Exh. JP-45(g))**.

inference in selecting from primary source data for NSC and NKK, are entirely consistent with both of these provisions.[235]

162. Japan's claim that the Department "required an impermissibly high level of cooperation from NKK and NSC" by requiring them to submit, within reasonable deadlines, conversion factors they were unquestionably able to submit by those deadlines is unconvincing.[236] Submitting information weeks and even months after it is requested, and after protestations that the requested information is unnecessary and impossible to provide, does not demonstrate "cooperation" as to that information simply because the information is finally produced prior to verification. Cooperation calls for the timely submission of data, as indicated by the fact that paragraph 3 of Annex II requires that only timely submitted data be taken into account, and for acting to the best of one's ability to provide requested data, as indicated in paragraph 5 of Annex II. Otherwise, respondents would have an incentive to delay the submission of selective pieces of information, waiting to determine whether the facts available an investigating authority might apply will yield better or worse results than the actual data. Because Japan has not demonstrated that NSC and NKK were cooperative with respect to the factors, paragraph 7 contemplates the selection of facts available that are less favorable to those firms.[237]

163. Finally, the Department's selection of facts available was not inconsistent with the "special circumspection" provision of paragraph 7 of Annex II. Here, the Department did act with circumspection, using as facts available not a secondary source but a primary source, namely data NSC and NKK had themselves timely provided on other sales. Furthermore, for that very reason, paragraph 7 of Annex II does not even apply to the facts available selected with respect to the theoretical weight issue, because that provision pertains expressly to situations in which authorities base their facts available findings on "information from a secondary source."

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[235] The Department's resort to facts available was also necessary because, as discussed above, it properly rejected NSC's and NKK's untimely provided conversion data. Therefore, contrary to Japan's argument at para. 111, there was, in fact, a "gap to fill." Paragraph 7 of Annex II creates no new and distinct requirement of necessity.

[236] First Submission of Japan at para. 112-113.

[237] Paragraph 7 does not require a separate "finding" that NSC and NKK "withheld" the factor information. Under the terms of paragraph 7, it is understood that if the authorities lack necessary information as a result of the failure of a party to cooperate in providing that information, it follows that "*thus* relevant information is being withheld from the authorities." When exporters or producers have the ability to provide requested data but do not provide it, the data is necessarily "withheld from the authorities."

### 2. Commerce's treatment of the untimely submitted conversion factors fully complied with Article 6 of the Agreement

164. In addition to meeting all provisions of Article 6.8 and Annex II with respect to the application of the fact available, the Department also fully complied with the provisions of Article 6 respecting the establishment of the facts in the underlying investigation.

#### a. Commerce gave NKK notice and ample opportunity to present the conversion factor information, as required by Article 6.1

165. Commerce also provided NKK with notice and ample opportunity to respond with respect to the weight conversion factor, as required by Article 6.1.[238]

166. Japan's Article 6.1 notice argument claims that the Department failed to "specify in detail the information required," within the terms of paragraph 1 of Annex II. In addition, Japan claims that Commerce "officials" misled NKK's attorneys, orally instructing NKK that it "need not submit any conversion factor," and thus violated both the notice and opportunity to respond provisions of Article 6.1.[239] Neither claim is supported by the record; the second is, furthermore, flatly incredible.

167. There was nothing vague about the Department's request for a conversion factor. As discussed above, Commerce stated that such a factor "must" be provided. It also did not prescribe any single methodology that had to be used to the exclusion of all others in arriving at such a factor, reasonably leaving such details to the respondent parties, who were more familiar than the Department with what data they had to work with and how their systems worked.

168. NKK did not provide the data requested in the initial questionnaire, apparently choosing to read Commerce's request very narrowly. Commerce's supplemental request to NKK apprized the company of the deficiency of its initial response: a failure to provide conversion factors that Commerce still required. NKK was not required to "guess what {Commerce} was looking for."[240] Commerce was clearly "looking for" a conversion factor, which it needed in order to compare theoretical and actual weight sales on a common basis. NKK's insistence on the narrow

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[238] *See* First Submission of Japan at paras. 117-119. (Japan's Article 6.1 argument is made solely with respect to NKK.) *Id.*

[239] *See* First Submission of Japan at paras. 118-119.

[240] *See* First Submission of Japan at para. 117.

reading that supported its "impossibility" thesis conveniently dovetailed with its stated belief that the information was unnecessary.

169. With respect to the second Article 6.1 claim, the Panel should disregard the self-serving thirteenth-hour allegation that "NKK attorneys called USDOC officials for clarification" and "those officials instructed that NKK need not submit any conversion factor."[241] The sole support for this claim is an extra-record affidavit from the attorney who claims to have made the telephone call in the course of which this alleged statement was made.[242] Even were the Panel to assume, *arguendo*, that counsel for NKK did telephone the Department "on or about" January 7, 1999 in order to seek clarification with respect to the Department's reiterated written request for a conversion factor, the analyst who responded may well have said, for example, that if NKK continued to take the position that providing a conversion factor was both unnecessary and impossible, it could so state. However, had the Department, as Japan suggests, gone further and modified the questionnaire requirement by orally withdrawing the requirement to provide such a factor, the Department would normally have memorialized such a change on the written record. NKK's experienced trade counsel, moreover, would have mentioned the change in NKK's questionnaire response to assure that this change in requirements was reflected on the record. The fact that neither of these things happened, and that no mention was made of this alleged change in the questionnaire requirement during the remainder of the investigation, suggests that the memory of precisely what may have been said during a phone call made on an uncertain date a year and a half ago is, at best, unreliable and thus cannot be relied upon by this Panel.[243]

### b. Article 6.6 did not require the Department to verify NSC's and NKK's untimely submitted conversion factors

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[241] First Submission of Japan at para. 118. Although Japan also relies upon variations of this claim at several other points in its brief, we address it only once. Because the central claim is not credible (and the document supporting it is not on the record), it would be pointless to discuss it in multiple contexts.

[242] The source is the Affidavit of Daniel L. Porter, at 3 (**Exh. JP-28**). For the reasons given in our Preliminary Objections, above, this document should be disregarded by the panel. In the alternative, however, above is a rebuttal to the charges made in that document with respect to this issue.

[243] It is also worth noting that the claim at para. 118 with respect to this phone call overstates even the claims made in the much more recent affidavit, which refers to a call by a single attorney, who spoke with a single analyst, who is alleged to have stated only that "the supplemental question was intended simply to confirm that NKK did not have a conversion factor to report." The affidavit further states that the analyst "did not indicate" what the Department expected or required. The transformation of this memory into an affirmation that multiple attorneys were told by multiple officials that, contrary to the standing written request, a conversion factor was affirmatively not required further demonstrates the unreliability of any claims as to this alleged conversation.

170. Article 6.6 provides, in full, that "{e}xcept in circumstances provided for in paragraph 8, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties *upon which their findings are based*" (Emphasis added.) Because the Department rejected NSC's and NKK's untimely submitted conversion factors, removed these data from the record, and did not base its findings upon those factors, there was no requirement under Article 6.6 that the Department verify these factors. Article 6.6 clearly does not require the Department to verify the accuracy of data it does not intend to use or even retain on the record, or, in the case of NKK, to memorialize the results of any examination at verification of such data.

### c. The Department's handling of the conversion factor issue was consistent with Article 6.13

171. Japan's claim that NSC and NKK faced difficulties with regard to the submission of the weight conversion factors which required some action by the Department under Article 6.13 is without merit. Article 6.13 states that "authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested and provide any assistance practicable." The drafters of the Agreement recognized that the need to submit large amounts of detailed data in advanced computer formats can be especially burdensome for small companies. The primary purpose of Article 6.13 was to alleviate that burden and ensure that companies experiencing such difficulties would nonetheless be able to participate in the investigation. Although the Article is not *per se* limited to small companies, it was not intended to excuse repeated errors, self-serving interpretations, or grossly untimely submissions by large, capable, sophisticated companies such as NSC and NKK.

172. Japan has failed to demonstrate that NSC and NKK were either unable to supply the requested information without special assistance from the Department or in fact experienced "difficulties" which led to the need for such assistance. Although NSC and NKK may have been burdened by the need to respond to the questionnaires in general, the record does not indicate that they required any special assistance with respect to this matter. Indeed, the fact that they were ultimately able to provide conversion factors within days of learning that their absence had resulted in the use of facts available in the preliminary determination belies the need for any special assistance such as the Department might render to small companies experiencing difficulties in dealing with the complexities of an antidumping questionnaire. Japan's reliance on Article 6.13 to excuse NSC's and NKK's belated submissions is, therefore, misplaced.

## 3. The Department's choice of facts available with respect to the weight conversion issue was consistent with Article 2.4 of the Agreement

173. The Department's utilization of NSC's and NKK's own verified information as facts available for the sales affected by the missing weight conversion factors was fully consistent with its obligation, under Article 2.4, to make a fair comparison between export price and normal value.

174. With respect to NKK, the failure to timely provide a conversion factor meant that the Department was unable to convert a small number of home market sales to an actual weight basis, and was therefore unable to determine the actual per metric ton normal value for these sales. The Department therefore substituted the highest per-product weighted average price for these few sales, and averaged them together with the actual weight sales of the same products. It then compared product-specific weighted average export prices to those weighted average normal values which were the most similar matches. Thus, the Department was able to make a fair comparison between export price and normal value with respect to NKK. Interpreting Article 2.4 to require that authorities use the "overall average normal value" for item-specific normal values which are missing due to the failure of a respondent to cooperate would nullify the provision of Annex II, paragraph 7 allowing authorities to select facts available "less favorable" to parties that have not been cooperative in providing what was requested of them.[244]

175. Because NSC's affected theoretical weight sales were export price sales, the Department assigned a margin to these sales based on margins calculated for NSC's actual weight sales of the same products. Although Japan complains because the Department did not, instead, calculate a surrogate export price for the affected products and then compare this to a normal value, Article 2.4 does not prevent authorities from utilizing a surrogate margin, rather than a surrogate export price. To the contrary, that provision must be read in tandem with Article 6.8, which clearly contemplates the use of facts available margins as well as of more limited facts available plugs. The margins used by the Department for this purpose, furthermore, fulfill the requirements of Article 2.4 because they were calculated by comparing (actual weight) export prices to (actual weight) normal values in accordance with Article 2.4. In addition, there was no information available that would allow the Department to determine export prices based on an adverse inference. Therefore, selecting margins for these sales was an appropriate way to apply an adverse inference.

#### 4. The Department's application of facts available to NSC and NKK is also consistent with Article 9.3 of the Agreement

176. Finally, the Department complied with the requirement of Article 9.3 that the amount of anti-dumping duty "not exceed the margin of dumping established under Article 2" because the

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[244] *See* First Submission of Japan at para. 136.

Department complied not only with the terms of Article 2.4, as demonstrated above, but also with all the other provisions provisions of Article 2. Therefore, the Panel should uphold the Department's determinations with respect to the theoretical weight factor issue.

## IV. Section 735(c)(5)(A) of the Tariff Act of 1930 is a Permissible Interpretation of Article 9.4 of the Agreement; Therefore, the Department's Application of that All Others Rate Provision of the Statute was Likewise Consistent with Article 9.4 of the Agreement

177. The "all others" rate is the margin of dumping assigned to respondents whose own data are not examined when an authority limits its examination to a sample and they are not selected as part of the sample. The margin for such respondents is, therefore, based on a weighted average of data submitted by the "selected" respondents. Article 9.4 of the Agreement and U.S. law, however, call for the authorities to disregard certain "outlier" types of margins when making this calculation: zero margins, *de minimis* margins, and margins established based on facts available. As we demonstrate below, the language and context of the Agreement support the position of the United States that such outlier margins should be disregarded in their entirety in making this calculation.

178. Similarly, the Department permissibly interprets the requirement of Article 9.4 to exclude "margins" which are zero, *de minimis* or established based on the facts available to refer only to an exporter or producer's overall margin, not to portions of that margin which may involve individual transactions dumped at rates that are zero, *de minimis* or based on partial or total facts available. Thus, an exporter or producer's margin which was not based entirely on facts available would still be fully weight-averaged in the calculation of the all others rate.

179. The interpretation urged by Japan, in contrast, improperly requires the Panel to read the term "margins" in Article 9.4 to mean "portions of the margins." That interpretation could lead to totally arbitrary results, including higher all others rates. It would, moreover, expose the calculation of the all others rate to manipulation by the selected respondents, who are competitors of the all others companies.[245]

### A. Articles 6.10 and 9.4 of the Agreement Provide for an All Others Rate Based on Overall Company-Specific Margins

[245] Because the all others companies are competitors of the selected companies in both the foreign and domestic markets, the selected companies, under the interpretation proposed by Japan, might find themselves "unable" to provide tiny bits of information affecting only products sold at prices that would yield low-end margins. Elimination of such sales from the all others margin calculation would result in higher all others margins for their competitors, as could elimination of all zero and *de minimis* portions of the overall margins for mandatory respondents.

180. The need for an all others rate described in Article 9.4, and thus the nature of that rate, proceeds from the recognition, in Article 6.10, that an administering agency will not always have the resources to examine each and every producer or exporter of subject merchandise. The first sentence of Article 6.10 refers to a "margin of dumping for each known exporter or producer." This plainly uses "margin" as meaning the company's overall (weight-averaged) margin. Therefore, Article 6.10 provides for the dumping margins of some producers or exporters to serve as proxies for those of other exporters or producers. In this case, the Department selected as its mandatory respondents NSC, NKK and KSC, the three companies with the largest volume of exports to the United States.[246] The appropriateness of that selection remains undisputed in this case.

181. Just as Article 6.10 provides for the consistent and objective selection of a sample which can serve as a proxy for the rest of the industry, Article 9.4 of the Agreement provides a method for using the margins from the proxy companies to determine the anti-dumping duty to be assessed on entries of merchandise exported by producers or exporters not included in that sample. This companion provision states, in pertinent part, as follows (emphasis added):

> When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:
>
> (i) the weighted average margin of dumping established *with respect to the selected exporters or producers* or,
>
> (ii) where the liability for payment of antidumping duty is calculated on the basis of a prospective normal value, the difference between the weighted average normal value **of the selected exporters or producers** and the export prices of exporters or producers not individually examined,
>
> **provided that the authorities shall disregard** for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6.

182. Article 6.8 provides that determinations may be made "on the basis of the facts available." Thus, Article 9.4 provides that, in calculating the all other rate, margins established on the basis of the facts available shall be disregarded. Article 9.4 also states that zero and *de minimis* "margins" shall be disregarded in the calculation of the all others rate. Such margins are, likewise, the entire weighted-average margins for each exporter/producer, not portions thereof, and no party here has suggested the contrary.

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[246] *LTFV Preliminary Determination*, 64 Fed. Reg. at 8292 **(Exh. JP-11)**.

183. Given the context of Article 9.4, a respondent company's margin is only "established under the circumstances referred to in paragraph 8 of Article 6" when it is based entirely on the facts available. Thus, when the Department assigns an exporter a calculated margin,[247] that exporter's margin is not a "margin established under the circumstances referred to in paragraph 8 of Article 6." Therefore, Article 9.4 addresses the situation where the overall company-wide margin is based entirely on the facts available.

184. In both the preliminary and final determinations in this case, Commerce used, as the all others rate, the weighted average of the rate it calculated for NSC, the rate it calculated for NKK and the rate it calculated for KSC.[248] As we demonstrate below, this methodology conforms to both Section 735(c)(5)(A) of the Act (19 U.S.C. § 1673d(5)(A) and to Article 9.4 of the Agreement.

### B. Section 735(c)(5)(A) Is A Permissible Interpretation of Article 9.4 of the Anti-dumping Agreement

185. The Department's methodology for determining the all others rate in this investigation was consistent with Article 9.4 of the Agreement because this rate was calculated in accordance with Section 735(c)(5)(A) of the Act, which is a permissible interpretation of that Article.

186. Congress amended the Act in the 1994 Uruguay Round Agreements Act ("URAA") to implement Article 9.4.[249] The Statement of Administrative Action ("SAA") accompanying the URAA stated:

> Recognizing the impracticality of examining all producers and exporters in all cases, Article 9.4 of the Antidumping Agreement permits the use of an all others rate to be applied to non-investigated firms. To implement the Agreement, section 219(b) of the bill adds section 735(c)(5)(A) to the Act which provides that the all others rate

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[247] When the Department is able to use the exporter's company-specific data in determining the margin for that exporter, the Department considers that respondent to have received a "calculated" margin. A calculated margin is not necessarily based solely on the exporter's submitted data. When an exporter's margin is based in part, but not entirely, on the use of facts available, that respondent's margin is considered a calculated margin based on "partial facts available," not simply a margin based on facts available.

[248] *LTFV Preliminary Determination*, 64 Fed. Reg. at 8299 **(Exh. JP-11)**; *LTFV Final Determination*, 64 Fed. Reg. at 24331, 24370 **(Exh. JP-12)**.

[249] Pub. L. No. 103-465, 108 Stat. 4809 (1994).

> will be equal to the weighted-average of individual dumping margins calculated for those exporters and producers that are individually investigated, exclusive of any zero and *de minimis* margins, and any margins determined entirely on the basis of the facts available. Currently, in determining the all others rate, Commerce includes margins determined on the basis of the facts available.[250]

187. Reflecting this intent to conscientiously amend U.S. law to implement Article 9.4, Section 735(c)(5), therefore, provided the following general rule for the calculation of the all others margin:

> {T}he estimated all others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely under section 776.[251]

188. Under U.S. law, the "weighted average margin of dumping" for the all others companies is calculated by weight-averaging the overall (weighted-average) margins for the mandatory respondents because the "margins" referred to in the portion of Article 9.4 which calls for disregarding certain "margins" are, in the context of Article 6.10 and the remainder of 9.4, the overall margin of each individual exporter or producer, rather than the component portions of those company-specific margins. Thus, the United States permissibly interprets the reference in Article 9.4 to "margins" established based on the facts available to mean company-specific margins established based entirely on the facts available.

189. A similar reference to the "margin" is contained at Article 5.8 of the Anti-dumping Agreement, which provides, in relevant part, for immediate termination of an investigation where the authorities determine that "the margin of dumping is *de minimis* ... ." The United States permissibly interprets this to mean that an investigation should be terminated when the overall margin is *de minimis*, rather than any margins associated with component transactions. Thus, the Agreement uses the term "margins" to mean entire respondent-specific margins, not merely portions of those margins. Japan's interpretation that "margins," as used in Article 9.4, refers to any portions of those margins would require a parallel reading of the term "margin" in Article 5.8 as applied to termination based on zero and *de minimis* margins. Because such a reading would

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[250] SAA at 873 **(Exh. US/B-27)**.

[251] Section 776 of the Act is the section dealing with determinations made based on the facts available. The complete text of Section 735(c)(5), as reported at 19 U.S.C. § 1673(d)(5), is shown at **Exh. JP-4(c)**.

require an authority to dismiss a case unless every single product was being dumped at non-*de minimis* rates, this clearly is not the reading the drafters intended.

190. Article 31 (1) of the Vienna Convention provides that a treaty "shall be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty *in their context and in the light of its object and purpose*" (emphasis added). Because the "context" of the reference to "margins" in the sentence in Article 9.4 includes earlier references to margins at the exporter-specific level both in Articles 6.10 and 5.8, and in the earlier portion of Article 9.4, the Department permissibly gave the same reading to the term "margins" in all of these segments of the Anti-dumping Agreement. Under principles of statutory construction, "where the meaning of a word is unclear in one part of a statute but clear in another part, the clear meaning can be imparted to the unclear usage on the assumption that it means the same thing throughout the statute."[252] This principle has been applied in the context of international dispute resolution.[253]

191. Specifically, Article 9.4 requires that the all others rate not exceed "the weighted average margin of dumping established with respect to the selected exporters or producers."[254] Thus, Article 9.4 clearly contemplates that the all others rate is to be based on the weighted average of the overall margins of dumping established for individual exporters or producers, not on portions of those margins associated with individual transactions or other components of the overall margin.[255]

## C. The Arguments Raised by Japan Lack Merit

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[252] Norman Singer, Statutes and Statutory Construction, § 47.16, at 272 (6th ed. 2000).

[253] *See Boundary Dispute Concerning the Taba Area (Egypt v. Israel)*, 27 International Legal Materials 1427, 1470 para. 177 (Egypt-Israel Arb. Trib. 1988)(finding the "it is only logical that the word 'address' should be given the same interpretation in two paragraphs of the same Annex").

[254] The United States does not calculate liability for payment of anti-dumping duties on the basis of a prospective normal value; thus, United States law is based on section (i) of Article 9.4, rather than on section (ii) of that Article.

[255] This reading is further buttressed by a parallel requirement, in section (ii) of Article 9.4, that, when a rate is set in a country which determines liability for antidumping duties on the basis of a prospective normal value, the only data from the originally-examined companies used for such purpose shall be the *single* weighted-average normal value of "the selected exporters or producers." It is reasonable to conclude that when no sale-specific portions of the exporters' overall margins are disregarded in determining the all others rate under national laws following the model in section (ii), the same principle is intended to apply to countries which must determine the all others rate using section (i).

192. Japan argues that the Department was required by Article 9.4 to disregard "the facts available *portion*"of the margins for the mandatory respondents.[256] Article 9.4, however, says nothing about discarding only a "portion" of the margins established "on the basis of the facts available." Instead, it calls for such "margins" to be disregarded in making this calculation. As demonstrated above, the United States permissibly interpreted this provision to mean that a company's margin should be either disregarded or not, as a whole. Japan has not demonstrated that the Agreement requires members to read the term "margins" to mean "portions of the margins." Thus, Japan has not carried its burden of proving that its preferred interpretation of the Agreement is the only permissible one, and the Panel must uphold the decision of the Department with respect to the calculation of the all others rate.

193. Japan's assertion that "the Agreement does not distinguish between determinations based entirely on facts available and determinations based partially on facts available" does not support the interpretation it urges upon the Panel.[257] This statement is based on the unstated assumption that the absence of an express reference in Article 9.4 to a distinction between margins based entirely on facts available and those based partially on facts available precludes an interpretation which makes such a distinction.

194. If this assumption is correct and the language of Article 9.4 is clear and complete on its face, then authorities must disregard all "margins" (not merely "portions" of margins) which are based wholly or in part on the facts available. The result would be a great many cases in which it would be impossible to calculate an all others rate under the Agreement because no margins would remain for this purpose. In this case, for example, the margins for NSC, NKK and KSC (*i.e.*, for all of the mandatory respondents), all of which are partial facts available margins, would all have to be disregarded. It is not logical that the Agreement would compel such a result.

195. If this assumption is not correct, the silence in the language of Article 9.4 as to whether the reference to margins established based on the facts available includes margins based in part on the facts available is due to an ambiguity in the language, in which case member countries are

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[256] First Submission of Japan at para. 140 (emphasis added).

[257] *See* First Submission of Japan at para. 135.

permitted to adopt a reasonable interpretation of the provision.[258] As we demonstrate below, the Department's interpretation is a permissible and workable one.

196. Japan's theory that Article 9.4 requires the Department to disregard the *portions* of the mandatory respondent margins that involve the use of the facts available appears to be based on the assertion that Article 6.8 (the article which provides for the use of the facts available) "contemplates the use of partial facts available whenever possible."[259] Like Japan's claim with respect to Article 9.4, this claim with respect to Article 6.8 is not substantiated. Article 6.8 itself makes no reference whatsoever to the use of partial facts available. While this absence of a counter indication clearly permits the use of partial facts available under appropriate circumstances, it in no way compels the agency to "use" partial facts available "margins," once calculated, in any particular way. Furthermore, Annex II, which is referenced in Article 6.8, also contains no provision describing how facts available margins should be "used" once they have been calculated or dictating that, having calculated partial facts available margins, the United States should then ignore the facts available portions of those margins "whenever possible."

197. Japan's argument that the impact of the facts available portion of the margins for mandatory respondents must be avoided as to the companies receiving the "all others" rate because these companies have not refused access to information or otherwise impeded the investigation also lacks merit.[260] The Department did not base the all others margin on the facts available, but rather on the results of the formula set forth in Article 9.4 and in the Act: using a weighted average of the margins for the mandatory respondents (none of which were zero, *de minimis* or established based on the facts available). Thus, the fact that the all others companies did not refuse access to information or impede the investigation is not relevant to the use of the overall margins for the three mandatory respondents to calculate the all others rate.

198. The use of the partial facts available margins for the mandatory respondents, furthermore, cannot be said to "punish" the all others companies simply because the result is less favorable to

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[258] Japan asserts, without support, that U.S.-proposed language which would have incorporated a reference to margins based "entirely" on facts available was rejected during the course of the Uruguay Round. First Submission of Japan at 42 n. 126. Even if the Panel were to assume, *arguendo*, the truth of that assertion, it would not follow that the language ultimately adopted foreclosed the interpretation adopted by the United States. Because Article 9.4 also does not expressly refer to disregarding the "portion" of a margin that is based on facts available, it is more likely that the negotiators agreed upon deliberately ambiguous language in order to accommodate their differing interpretations.

[259] First Submission of Japan at para. 137.

[260] *See* First Submission of Japan at para. 138.

them than the result would be under Japan's preferred interpretation.[261] While the terms of the formula set forth in Article 9.4 may result in either detrimental or beneficial rates for individual companies in particular cases, these terms are themselves intended to be neutral, as befits a margin for companies about whose pricing practices nothing is known.[262] Just as the provision in Article 9.4 for exclusion from the all others rate of margins that are zero or *de minimis* is not a punishment, the exclusion from this calculation of margins established based on facts available is not a reward. Thus, not excluding facts-available "portions" of a margin which is not, overall, "established based on facts available" certainly cannot be said to "punish" the all others companies. Article 9.4 does not provide for either punishment or reward; it simply provides for the elimination of "margins" that fall into outlier categories on both sides of the scale, such that the margin for the all-other companies is based on the overall response of the remaining mandatory respondents.

199. Japan's interpretation that an agency must disregard the facts available "portions" of the margins of the mandatory respondent also fails to realistically take into consideration the multiple levels at which the use of facts available must often be applied in practice, and would therefore result in an unworkable general rule.

200. Given the complexity of an anti-dumping investigation, a myriad of individual data items, relating not only to price but also to cost and product characterization (such as the weight conversion factor), must be provided. Not all respondents are able to bring to this process the high levels of manpower, technical expertise and computerization characteristic of Japan's largest steel companies. This frequently results in the use of at least some facts available. For example, if a respondent is unable to supply, or to adequately support, the value of an input, the Department may be required to use facts available as a proxy for that value in calculating a constructed value[263]

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[261] *See Id.*

[262] The calculation of margins for some firms based on the experience of other firms necessarily leads to some degree of inaccuracy. This may favor the all others firms or be adverse to them. For example, it might well be argued that basing the all others rate on the average margins for the largest exporters results in an unrepresentatively low margin because larger companies may have greater efficiencies of scale than smaller companies.

[263] Article 2.2.1 permits home market sales to be treated as not in the ordinary course of trade and thus disregarded from the margin calculation when they are made at prices below their per-unit cost of production. When there are insufficient home market sales available for comparison purposes for this, or other reasons, Article 2.2 provides that the export sales may be compared with "the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits." This constructed cost of the exported sales is known used as normal value, cost is termed "constructed value." *See* Section 773(e) of the Act (19 U.S.C. § 1677b(e)) **(Exh. JP-4(j))**.

for use in a margin comparison. If the input is part of the cost structure of a wide range of products, it is not possible to disregard the facts available portion of the calculation without disregarding all of the affected transactions. This is the case even if the input is a very minor one, even if the facts-available "plug" is a non-adverse one, and even if the effect of this use of facts available has an infinitesimal effect on individual margins.[264] Given that the use of such "plugs" is not uncommon in many investigations and reviews, it is also not uncommon for many--or even all--of a participating respondent's sales to be affected to some degree by the use of partial facts available.

201. If the Panel were to accept Japan's interpretation, all "portions" of a respondent's margin affected in part by facts available would have to be disregarded in calculating the all others rate. The calculation of the all others rate would then depend not upon a broader universe of data, but upon the random assortment of remaining "portions" for which no odd bit of information was missing. Such an approach would be much less transparent than the methodology the United States currently uses, and would not necessarily result in either more reasonable or lower all others rates.

202. Such an approach would also encourage manipulation with respect to data submission. Under the methodology prescribed in the Act, the level of the all others margin is tied to the level of the overall margins of the mandatory respondents, not merely to selective "portions" of a database controlled by those respondents. Under the approach Japan seeks to compel, this would no longer be the case. This is one of the problems the interpretation of the United States, a regular nuts-and-bolts user of the antidumping law, seeks to address.

203. In summary, Japan seeks to have the Panel demand an interpretation of Article 9.4 which would compel the Department to eliminate from its all others rate calculations "portions" of the partial facts available margins calculated for the mandatory respondents. To obtain that end, however, Japan must demonstrate to the Panel that the Department's statutory provision, which must provide rules not only for this case but for a host of other cases with more complex situations

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[264] For example, Kawasaki's margin in the *Japanese Steel Plate* case was a partial facts available margin. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-To-Length Carbon Quality Plate Products from Japan*, 64 Fed. Reg. 73215, 73226-27 (December 29, 1999)**(Exh. US/B-48)**. Because the Department was unable to verify the reported dates of payment to make a necessary calculation of home market credit expenses, the Department determined that it was necessary to resort to the use of facts available with respect to the number of days for which credit was extended. *Id.* Because the Department agreed that Kawasaki's affiliated trading company Kawasho was unable to systematically determine the actual date of payment, and that actual payment dates were both earlier and later than the reported dates, it applied a non-adverse adjustment to the reported payment dates for all of Kawasho's home market sales. *Id.* Despite the necessarily broad application of this facts available element, the number of credit days is only one component of a single adjustment among many.

with respect to the use of facts available, is an impermissible interpretation of Article 9.4. Japan has not done so. Indeed, because the United States gives to Article 9.4 is wholly consistent with the context in which it occurs and with the purpose of the provision of which it forms a part, Japan cannot do so. Thus, the permissible, reasonable and workable statutory interpretation of Article 9.4 in U.S. law must stand, as must the calculation of the "all others" rate in this investigation, which fully complied with that statutory provision.

## V. The Department's Application of the "Arm's Length" Test, Which Determined That Some Exporter's Home Market Sales to Affiliates Were Not Made in the Ordinary Course of Trade, and Subsequent Use of Home Market Downstream Sales to Calculate the Normal Value for Such Sales, Was Consistent with Article 2 of the Agreement

204. The Department's application of the "arm's length" test, which determined that some exporter's home market sales to affiliates were not made in the ordinary course of trade, and its subsequent use of home market downstream sales to calculate the normal value for such sales, was consistent with Article 2 of the Agreement. In order for an exporter's home market sales to affiliated customers to be included in the normal value calculation, Article 2.1 of the Agreement specifically states that such sales must be made in the ordinary course of trade. That provision is subject to more than one permissible interpretation as to how authorities should determine whether such sales are made in the ordinary course of trade.

205. It is generally recognized that sales to affiliated customers are inherently suspect and may form an unreliable basis for the dumping calculations. Indeed, the Agreement makes explicit provision for the exclusion of sales to affiliated importers. Article 2.3 permits the calculation of a "constructed" export price "{w}here it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer."

206. Home market sales may be similarly "unreliable because of association" between the producer and a customer in the country of export. Such sales may, therefore, reasonably be excluded under the "outside the ordinary course of trade" provision of Article 2.1. Indeed, Mexico defines all affiliated-party transactions as being "outside the ordinary course,"[265] while the

[265] Mexico's Foreign Trade Act at Article 32 (defining the term "in the ordinary course of trade" to include only "transactions . . . between independent buyers and sellers") (WTO Doc. No. G/ADP/N/1/MEX/1) **(Exh. US/B-28(a))**.

European Community,[266] Brazil,[267] Argentina,[268] and Korea,[269] like the United States, treat as outside the ordinary course those affiliated-party sales not made at arm's length. In addition, Australia and New Zealand exclude some, and Canada excludes all, affiliated customer sales from the calculation of normal value without explicit reliance upon the "outside the ordinary course" provision. [270]

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[266] The relevant EC provision states:

> Prices between parties which appear to be associated or to have a compensatory arrangement with each other may not be considered to be in the ordinary course of trade and may not be used to establish normal value unless it is determined that they are unaffected by the relationship.

WTO Doc. No. G/ADP/N/1/EEC/2, Council Regulation No. 384/96, Article 2 **(Exh. US/B-28(b))**. Pursuant to this legislation, the EC, like the United States, compares prices to affiliated and unaffiliated customers, and rejects transfer prices where "the analysis of prices of sales . . . to both related and unrelated customers did not show that the prices to the former were at arm's length." *Council Regulation (EC) No. 393/98 of 16 February 1998 imposing a definitive anti-dumping duty on imports of stainless steel fasteners and parts thereof originating in the People's Republic of China, India, the Republic of Korea, Malaysia, Taiwan, and Thailand*, O.J.L. 50, p.1, rec. 21 (Feb. 20, 1998) **(Exh. US/B-29)**.

[267] The relevant Brazilian statute provides:

> Transactions among parties who are considered associated or who have agreed to a compensatory arrangement among themselves may be considered as not being in the ordinary course of trade and not be taken into account in determining normal value, unless it is proven that the related prices and costs are comparable to those of operations among parties that are not so related.

WTO Doc. No. G/ADP/N/1/BRA/2, Legislative Decree No. 1602 of August 23, 1995 at Article 6.4 **(Exh. US/B-28(c))**.

[268] The Argentine statute provides that a "sale shall be considered as having been made in the ordinary course of trade," when "(a) the price is not affected by any of the associations or relationships" and "(b) the sale price is not lower than the cost of production." WTO Doc. No. G/ADP/N/1/ARG/2, Decree No. 2121/94 at Article 13 **(Exh. US/B-28(d))**.

[269] The relevant Korean regulations state that "in calculating the prices in the ordinary course of trade, . . . sale prices shall not be used as a basis {for normal value} where the sales price between such related parties as prescribed in Article 3-6(1) of the Decree was affected by such a relation." WTO Doc. No. G/ADP/N/1/KOR/4, Customs Regulations at Article 4-4(1). *See also* Article 4-6(1) (normal value) **(Exh. US/B-28(e))**.

[270] *See* Australia's Customs Act of 1901 at 269TAA(1)(b) & 269TAC(1) (excluding from normal value all non-arm's length transactions, defined as occurring where "the price is influenced by a commercial or other relationship between the buyer, or an associate of the buyer, and the seller, or an associate of the seller") (WTO Doc. No. G/ADP/N/1/AUS/1) **(Exh. US/B-28(f))**; New Zealand's Dumping Act at §§3(2) and 5 (excluding from normal value all non-arm's length transactions, defined as occurring where "the price is influenced by a

207. The Department instructs respondents that "if you sold to an affiliate who resold the merchandise, report the affiliate's resales to unaffiliated customers {i.e., home market downstream sales} rather than your sales to the affiliate."[271] However, the Department accepts the reporting of affiliated-party home market sales in lieu of home market downstream sales where the former pass the arm's-length test.[272] As a result, if a respondent's sales relationship with an affiliated customer passes the arm's length test, sales to that affiliated customer can be used despite the affiliation – an option that is unavailable in countries such as Canada and Mexico which automatically disregard all affiliated customer sales and instead base normal value on the downstream sales corresponding to such transactions. Furthermore, if downstream sales are used in the normal value calculation, the Department will determine whether they are made at a different level of trade and, if so, determine whether a level of trade adjustment should be made.[273] Therefore, the Department's practice is consistent with Article 2.4, as is evident when this provision is read in combination with Articles 2.1 and 2.2.

### A. Factual Background

208. In the *Preliminary Determination*, the Department tested whether home market sales by the respondent exporters to affiliated customers were arm's length transactions by applying its "99.5 percent" methodology, which compares prices between affiliated and unaffiliated purchasers, as explained below.[274] The majority of KSC's total home market sales were made through Kawasho, an affiliated trading company.[275] KSC reported the downstream sales by Kawasho,

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relationship between the buyer, or a related person, and the seller, or a related person") (WTO Doc. No. G/ADP/N/1/NZL/2) **(Exh. US/B-28(g))**; Canada's Special Import Measures Act § 15(a)(i) ("where goods are sold to an importer in Canada, the normal value of the goods is the price of like goods when they are sold by the exporter of the first mentioned goods to purchasers *with whom the exporter is not associated* at the time of the sale of the like goods") (WTO Doc. No. G/ADP/N/1/CAN/1) (emphasis added) **(Exh. US/B-28(h))**.

[271] Department's Initial Section B Questionnaire at B-1(October 30, 1998) **(Exh. US/B-30)**.

[272] 19 C.F.R. § 351.403(d) **(Exh. JP-5(g))**. *See also Certain Corrosion-Resistant Carbon Steel Flat Products From Japan*, 64 Fed. Reg. 44483, 44486 (August 16, 1999) (prelim. results) ("the Department normally will not require the respondent to report the affiliate's downstream sales unless the sales to the affiliate fail the arm's length test") **(Exh. US/B-31)**.

[273] 19 U.S.C. 1677b(a)(7)(A) **(Exh. JP-4(j))**.

[274] *Preliminary Determination,* 64 Fed. Reg. at 8295 **(Exh. JP-11)**.

[275] *KSC Preliminary Analysis Memo* at 2 **(Exh. US/B-6)**; *see also LTFV Preliminary Determination*, 64 Fed. Reg. at 8295 **(Exh. JP-11)**.

which made sales to both affiliated and unaffiliated customers.[276] The Department's arm's length test indicated that sales by Kawasho involving one affiliate were made at arm's length.[277] KSC did not provide data on certain other downstream sales because the affiliates were not able to trace the original purchase of subject merchandise from KSC to their resale to an unaffiliated customer.[278] The Department excused KSC from reporting downstream sales which accounted for less than three percent of each firm's total home market sales of subject merchandise.[279]

209. A significant percentage of NSC's total home market sales were to affiliated parties.[280] NSC requested that it not be required to report downstream sales made by four affiliated companies, but provided data on other downstream sales which accounted for the majority of home market sales to affiliated trading companies.[281] The unreported downstream sales made by NSC's four affiliated trading companies represented a small percentage of NSC's total home market sales.[282] Furthermore, the results of the arm's length test indicated that NSC's sales to two of the four trading companies were made at arm's length.[283] The Department determined that the portion of home market downstream sales by two affiliated customers that failed the arm's length test was insignificant, and that NSC had put ample information on the record indicating that these sales were not essential to the Department's analysis.[284] Therefore, NSC was not required to report these downstream sales.

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[276] *Id.*

[277] *Id.*

[278] *Id.* at 2-3.

[279] *KSC Preliminary Analysis Memo* at 3 **(Exh. US/B-6 )**. Pursuant to Section 351.403 of the Department's regulations (19 C.F.R. §351.403), the Department does not normally require the reporting of home market downstream sales if total sales of the foreign like product by a firm to all affiliated customers account for five percent or less of the firm's total sales of the foreign like product.

[280] *NSC Preliminary Analysis Memo* at 2 (February 12, 1999) **(Exh. US/B-32)**; *see also Preliminary Determination*, 64 Fed. Reg. at 8296**(Exh. JP-11)**.

[281] *Id.*

[282] *Id.*

[283] *Id.*

[284] *Id.*

210. NKK submitted its home market sales as well as the downstream sales of its affiliated resellers.[285] The Department determined that NKK's home market sales to one of its affiliates failed the arm's length test, while NKK's home market sales to its other affiliates passed the arm's length test.[286] NKK argued that the Department should use a different arm's length test than it normally uses.[287] The Department disagreed and, in the *Final Determination*, continued to apply its established methodology.[288] The Department noted that, although NKK had proposed an alternative methodology based on a statistical approach, it had not demonstrated that the Department's current methodology was unreasonable.[289] Furthermore, the Department explained that it applies the arm's length test on a customer-by-customer, rather than a product-by-product, basis, because "the question underlying the test is whether affiliation between the seller and the customer has (in general) affected pricing."[290]

### B. The Department's "Arm's Length" Test Focuses on the Relationship Between Affiliated Parties

211. The Department runs a basic test to determine whether home market sales by exporters to affiliated customers were made at prices comparable to those to unaffiliated customers. If they are comparable, then the sales to that affiliated customer are deemed to be at "arm's length," *i.e.*, the affiliation does not distort pricing. This is a permissible interpretation of the relevant provisions of the Agreement. If such sales were not made at arm's length prices and thus not in the ordinary course of trade, the Department may use the affiliated customer's downstream sales in calculating normal value, depending on the nature of the merchandise sold to and by the affiliate, the volume of sales to the affiliate, and the level of trade involved.[291] Canada also provides for the use of

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[285] *NKK Preliminary Analysis Memo* at 2 (February 12, 1999) **(Exh. US/B-33)**.

[286] *Id.*

[287] *LTFV Final Determination*, 64 Fed. Reg. at 24341 **(Exh. JP-12)**.

[288] *Id.* at 24342.

[289] *Id.*

[290] *Id.*

[291] *Preliminary Determination*, 64 Fed. Reg. at 8297 **(Exh. JP-11)**.

downstream sales in lieu of home market sales.[292] The Department's use of downstream sales in this case is discussed above.

212. The Department's policy is to treat home market sales by an exporter to an affiliated customer as having been made at arm's length if prices to that affiliated customer are, on average, at least 99.5 percent of the prices charged to unaffiliated customers.[293] The purpose of the arm's length test (also referred to as the 99.5 percent test) is to determine whether the affiliation between the seller and the customer has, in general, affected the pricing of the goods sold to the affiliated customer. When the affiliation between a given seller and a given customer does affect pricing, the affected sales are reasonably deemed "not in the ordinary course of trade." Thus, the prices associated with those sales are not used in the calculation of normal value.

213. The Department's 99.5 percent arm's length test is conducted in the following manner:

Step one: The Department separates each exporter/producer's customer into two groups: affiliated customers and unaffiliated customers. For each affiliated customer, the Department calculates a weighted average[294] net price for sales of each product (CONNUM[295]). All of that exporter/producer's sales to unaffiliated customers are combined in one pool, and the Department

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[292] The relevant Canadian provision states:

> if there was not, in the opinion of the Deputy Minister, such a number of sales of like goods made by the exporter to purchasers described in subparagraph 15(a)(i) {i.e., "purchasers with whom the exporter is not associated"} who are at the same or substantially the same trade level as the importer in Canada as to permit a proper comparison with the sale of goods to the importer, but there was such a number of sales of like goods made to purchasers described in subparagraph 15(a)(i) who are at the trade level nearest and subsequent to that of the importer, there shall be substituted for the purchasers described in paragraph 15(a) purchasers described in subparagraph 15(a)(i) who are at the trade level nearest and subsequent to that of the importer.

Canada's Special Import Measures Act, Section 15(b) (WTO Doc. No. G/ADP/N/1/CAN/1) **(Exh. US/B-28(h))**.

[293] *Antidumping Duties; Countervailing Duties – Final Rule*, 62 Fed. Reg. at 27296, 27355 **(Exh. JP-39)**.

[294] Weighted average is generally defined as "an average computed by counting each occurrence of each value, not merely as single occurrence of each value." Stickney, Weil, & Davidson, *Financial Accounting* (6th ed. 1991) at 825 **(Exh. US/B-34)**.

[295] A CONNUM is a product model as defined by the Department's matching characteristics.

calculates a weighted average net price for sales of each product (CONNUM) to the unaffiliated customer group.

Step two: Working on a customer-specific basis, the Department compares the weighted-average price of a product sold to an affiliated customer to the weighted-average price of the same model to the unaffiliated customer group. Models which are sold only to the affiliated customer provide no basis for price comparison, and are eliminated from the test.

Step three: The Department calculates, for each affiliated customer and product-specific price comparison, the ratio of the weighted-average price to the affiliated customer to the weighted-average price to the unaffiliated group, using the formula of affiliated net price/unaffiliated net price, multiplied by 100.

Step four: On a customer-specific basis, the Department calculates a weighted average of the ratios calculated in step three for all of the products sold to that affiliated customer (other than products that were not sold to unaffiliated parties, as noted in step two). This yields a composite ratio representing the overall relationship between prices to that affiliated customer and prices to unaffiliated customers.

Step five: Sales made to affiliated customers whose overall prices are at least 99.5 percent of the overall prices to unaffiliated parties are deemed to be at arm's length, and all sales to such customers are retained for use in determining normal value regardless of whether the price ratio for individual products is greater or less than 99.5 percent. Sales made to customers whose overall prices do not pass this test are deemed not to be made at arm's length and thus not made in the ordinary course of trade. The Department does not use sales to these customers in determining normal value. Instead, respondents are asked again to report downstream sales made by these affiliates to their unaffiliated customers, unless one of the exceptions noted above applies.

### C. The Agreement Is Subject to More than One Interpretation as to How Authorities Should Determine If an Exporter's Home Market Sales to Affiliated Customers Were Made in the Ordinary Course of Trade, and the Arm's Length Test Is a Permissible Interpretation

214. The Agreement is subject to more than one interpretation as to how authorities should determine if an exporter's home market sales to affiliated customers were made in the ordinary course of trade, and the arm's length test is a permissible interpretation. Article 2 sets forth the general provisions of the Agreement which address the determination of dumping. Article 2.1, in establishing the basic tenets of the determination of dumping, provides definitions of the term dumping ("introduced into the commerce of another country at less than its normal value") and of

the term normal value ("the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country"). However, Article 2.1 does not specify how to determine if home market sales were made in the ordinary course of trade. The Department, therefore, must interpret Article 2.1 for purposes of determining whether home market sales to affiliated customers were made in the ordinary course of trade. The Department's arm's length test, as described above, constitutes a permissible interpretation.

215. Also, Article 2.1 permits the use of home market downstream sales in order to calculate normal value.[296] As stated above, this provision defines normal value as "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." Home market downstream sales meet the definition of normal value because the sales price being used by the Department in the normal value calculation is that of the same product sold by the exporter through its affiliate for consumption in the home market. The product has not left the home market, and the downstream sale is not unreliable based on affiliation. Japan fails to address this issue in its submission.

216. Although Article 2.2 suggests one example (i.e., certain sales below cost) of transactions made outside the ordinary course, this is not, nor was it ever intended to be, an exhaustive or even illustrative list.[297] To the contrary, Article 2.2 merely sets forth a single instance where sales may be considered outside the ordinary course of trade.[298] The Agreement, however, imposes no other limitations or restrictions on the application of the outside the ordinary course provision.

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[296] Home market downstream sales to an unaffiliated party may be used by the Department to calculate normal value when, based on the factors discussed above, home market downstream sales reflect normal value more reliably than the transfer price sales.

[297] The negotiating history of the Agreement shows that attempts were made to include an illustrative list of sales considered "outside the ordinary course of trade." *See Amendments to the Anti-dumping Code: Submission by the Nordic Countries*, GATT Doc. No. MTN.GNG/NG8/W/64 (Dec. 22, 1989) at 2-3 (including the examples of "sales at strongly reduced prices to liquidate the end of stock," "sales at particularly advantageous prices having the character of gifts to important interest groupings for the company of business sector," and "low price sales offers, which are valid for very limited periods of time, to introduce new products") **(Exh. US/B-35)**. Nevertheless, the prevailing view was that "strictly defining 'ordinary course' was almost impossible and even inappropriate." *Meetings of 31 January-2 February and 19-20 February 1990*, GATT Doc. No. MTN.GNG/NG8/15 (Mar. 19, 1990) at 13 **(Exh. US/B-36)**. Negotiators were "not certain that a detailed examination would lead to a list, be it an exhaustive or illustrative one," and believed "that the proposal to give a positive definition of cases which were not in 'the ordinary course' was certain to lead to controversy in the Group." *Id.*

[298] Article 2.2.1 provides, in relevant part, that sales below cost "may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time."

Therefore, the provisions of Article 2.2 concern what an authority may do in order to disregard home market sales because they are below cost, and leave open to permissible interpretation what an authority may do if affiliation has rendered home market sales unreliable.

### 1. Japan misinterprets the application of Article 2 of the Agreement

217. Japan alleges that the Department's determination of dumping is inconsistent with Article 2 of the Agreement, in that the Department employed a methodology which improperly excludes certain home market sales from the calculation of normal value, and replaces such sales with downstream sales.[299] In particular, Japan argues that under Article 2.1, read in conjunction with Article 2.4, "a 0.5 percentage point average price differential is too small a difference upon which to base a finding that sales to affiliates are not ordinary."[300] However, as stated above, Article 2.1 does not specify how to determine if home market sales were made in the ordinary course of trade, and thus does not compel that conclusion. The Department, therefore, must interpret Article 2.1 for purposes of determining whether home market sales to affiliated customers were made in the ordinary course of trade. The Department's arm's length test, as described above, constitutes a permissible interpretation.

218. Japan also challenges the arm's length test under Article 2.4[301] of the Agreement.[302] The first sentence of Article 2.4, in particular, provides that "{a} fair comparison shall be made between the export price and the normal value." Japan argues that the methodology applied by the Department in determining whether home market sales to affiliated customers were made in the ordinary course of trade does not allow for a fair comparison between export price and normal value.[303] In effect Japan is claiming that the arm's length test is unfair.

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[299] Japan Panel Request at 3 **(Exh. US/A-1)**; First Submission of Japan at para. 141.

[300] First Submission of Japan at para. 160.

[301] Article 2.4 of the Agreement provides, in relevant part, that "a fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability."

[302] First Submission of Japan at para. 165.

[303] *Id.*, para. 167.

219. In arguing that the 99.5 percent test is unfair, Japan improperly urges the Panel to impose upon the United States its own definition of what it considers fair.[304] Instead, Article 2.4 itself speaks to this issue, providing that comparisons are fair if made in accordance with the requirements of that provision. For example, Article 2.4 requires that the comparison shall take into consideration level of trade, the contemporaneity of sales, differences in circumstances of sale, and other differences demonstrated to affect price comparability. The Department's margin calculation takes all of these things into consideration.[305] Since all comparisons of export price or constructed export price to normal value based on downstream sales complied with the requirements of Article 2.4, such comparisons were fair.

220. Moreover, although not required by the Agreement, the Department's arm's length test also takes into consideration factors enumerated at Article 2.4. Indeed, the test's methodology, which involves ex-factory price comparisons of a producer's sales weight-averaged by product, is virtually identical to the margin calculation itself. This is because the margin calculation and the arm's length test have parallel objectives: the former discerns whether there has been significant price discrimination between home market and U.S. sales in the same way that the latter discerns whether there has been significant "price discrimination" between affiliated and unaffiliated customer sales.

221. In the context of an investigation, the only other meaningful difference between the margin calculation and the arm's length test is in what the Department considers "significant." Whereas the former treats margins under 2 percent as *de minimis*, the latter utilizes a 0.5 percent threshold (i.e., sales to affiliated customers are excluded only if, on average, they are more than 0.5 percent below the average arm's length price). However, the 0.5 percent *de minimis* standard is not, as Japan now contends, "too small."[306] Indeed, it is the very same *de minimis* standard as that applied to the margin calculation in the context of administrative reviews -- a standard that has been specifically upheld as reasonable by a WTO panel.[307] Because the nature of affiliation does not

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[304] *See* 19 U.S.C. 1677b(a): "In determining under this title whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value." **(Exh. JP-4(j))**.

[305] *See, e.g., LTFV Preliminary Determination*, 64 Fed. Reg. at 8294 **(Exh. JP-11)**.

[306] First Submission of Japan at para. 160.

[307] *See Dynamic Random Access Memory Semiconductors of one Megabit or Above from Korea*, WT/DS99/R (Jan. 29, 1999) at p. 150, para. 6.90. The panel held that, because the function of Article 5.8's 2 percent *de minimis* standard was to determine "whether or not an exporter is subject to an anti-dumping order," it did not preclude Members from adjusting the threshold for other purposes. Specifically, the Panel found "logical explanations for applying different *de minimis* standards in investigations and Article 9.3 duty assessment

vary between investigations and administrative reviews, it would be absurd to include sales to a particular affiliated customer in an investigation (using a 2 percent *de minimis* threshold) that would otherwise be excluded in a review (using a 0.5 percent *de minimis* threshold). There is thus no reason to depart, for purposes of investigations, from the application of the arm's length test's 0.5 percent de minimis threshold used in administrative reviews.[308]

### 2. Japan fails to prove that the Department's current arm's length test is not a permissible interpretation of Article 2.1

222. As explained above, the purpose of the arm's length test is to determine whether the affiliation between a given seller and a given buyer affects pricing in general between those firms.[309] However, Japan argues that the 99.5 percent test creates "inherent distortions."[310] Japan also claims that since the test considers higher prices to be normal no matter how high, and tests only

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procedures," and upheld the application of a 0.5 percent *de minimis* test in administrative reviews. *Id.* Similarly, Article 5.8 contains no *de minimis* standard for the comparisons involved in determining whether sales have been made outside the "ordinary course of trade."

[308] It has been noted that the heightened 2 percent *de minimis* standard for the final margin calculation:

> recognized that for purposes of investigations, a higher (more forgiving) standard of "actionable dumping" (which is what a *de minimis* standard is) was appropriate. This recognition is consistent with the fact that the calculation of a dumping margin necessarily involves scores (and in some cases, hundreds) of discrete factual determinations, some of which may involve situations where the outcome is close and the exercise of human judgment is unavoidable. For example, in the case of an adjustment to normal value, it may be a "close call" as to whether a particular expense is direct or indirect or whether the amount of the adjustment has been properly documented. This inevitable aspect of the anti-dumping process arguably makes it unfair to subject parties involved (perhaps for the first time) in an initial investigation of dumping to an overly rigorous standard of actionable dumping.

*Dynamic Random Access Memory Semiconductors of one Megabit or Above from Korea*, WT/DS99/R (Jan. 29, 1999) at 127, Para. 4.661 (restating the position of the United States). There is no similar justification for having a heightened *de minimis* standard for the arm's length test in investigations. Article 5.8 already provides a sufficient "cushion" to protect producers from antidumping orders in "close calls."

[309] *LTFV Final Determination*, 64 Fed. Reg. at 24342 **(Exh. JP-12)**.

[310] First Submission of Japan at para. 168. *See also* Affidavit of Robert H. Huey, Counsel to KSC **(Exh. JP-44)**; Affidavit of Daniel L. Porter, Counsel to NKK **(Exh. JP-28)**; *and* Affidavit of Daniel J. Plaine, Counsel to NSC **(Exh. JP-46)**.

lower prices, it produces absurd results.[311] Japan proposes that a new test be applied to determine whether home market sales by exporters to affiliates were made at arm's length prices, which it incorrectly claims the Department did not seriously consider.[312]

223. In fact, the Department did seriously consider Japan's proposed test, and found it fundamentally flawed. First, under Japan's proposed product-specific approach, affiliation could be found to have affected sales prices for some models, but not for others, even though the customer in both cases is the same.[313] Because affiliation involves relationships between firms, the focus of the Department's arm's length test is on the overall relationship with a particular customer, not the price of each particular product. In all cases, the focus of the Department's arm's length test, and thus the determination of whether home market sales to affiliated customers were made in the ordinary course of trade, is on the relationship between the seller and the customer, not on a particular product.[314] Therefore, under its methodology, the Department makes one up-or-down call on pricing to an affiliated customer: either there is arm's length pricing between the producer and that customer or there is not.[315] Rather than looking to pricing at the product-specific level, the Department reasonably prefers to focus on the overall relationship. This approach does not preclude findings that particular sales to a customer are outside the ordinary course of trade for other reasons. It only means that the arm's length test has a specific purpose. Such an interpretation of the "ordinary course of trade" provision of Article 2.1, while perhaps not the only reasonable interpretation, is certainly a permissible one.

224. Second, Japan argues that its standard deviation analysis more properly accounts for what it calls "variability in prices."[316] This line of argument reinforces the point that there is more than

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[311] First Submission of Japan at para. 168. This argument underscores Japan's misinterpretation of Article 2. Specifically, Article 2.1 says that "a product is to be considered as being dumped, i.e, introduced into the commerce of another country at less than its normal value..." Therefore, the determination of dumping is not concerned with sales prices higher than normal value.

[312] *See* First Submission of Japan at 47 n.144, 50 n.153.

[313] *See Final Determination*, 64 Fed. Reg. at 24342 **(Exh. JP-12)**.

[314] *See Id.*

[315] *Id.*

[316] First Submission of Japan at para. 169. The standard deviation analysis is completely reliant on the model-specific approach rejected above, because standard deviation analysis requires a symmetrical, bell-shaped frequency distribution of data, which is unlikely under the customer-specific approach. *See LTFV Final Determination*, 64 Fed. Reg. at 24342 **(Exh. JP-12)**.

one interpretation of the meaning of "ordinary course of trade," and that the Department's arm's length test is a permissible interpretation. Nevertheless, Japan submits at Exhibit JP-53 descriptions of several hypothetical situations where such price variability causes affiliated-party sales to fail the Department's 99.5 percent test. However, Japan's proposed methodology errs significantly on the side of inclusion – it excludes only those affiliated-party prices that can be shown to a high degree of certainty not to have resulted from normal price variability. In effect, the proposed statistical approach simply lowers the threshold at which sales to affiliated parties will be considered to be arm's length sales. While lowering the threshold for accepting affiliated-party sales may provide increased certainty that those sales prices excluded from the normal value calculations were in fact influenced by affiliation (rather than by normal price variability), it provides no assurance that those sales prices included were not so influenced.[317] The Department's 99.5 percent test is designed to ensure that sales outside the ordinary course of trade are not used as normal value; the test Japan urges the Panel to impose falls short of that goal.

225. Unlike the Japanese proposal, the Department's method is consistent with the normal process under the Agreement for determining dumping margins. Moreover, the margin calculation after which the arm's length test is modeled does not use such a statistical methodology. Dumping occurs where export price is below normal value by a non-*de minimis* margin calculated on an aggregate weighted average basis (such as that used in the 99.5 percent test), whether or not that margin resulted from a practice of price discrimination or was a consequence of price variability. Indeed, the problems described in the hypothetical situations at Exhibit JP-53 are also inherent in the margin calculation itself. The margin calculation, which is prescribed by the Agreement, contains no statistical mechanism such as that now proposed, by which to identify "outliers" that could not have resulted from price variability. There is no reason why the arm's length test must operate differently.

226. It is helpful to briefly illustrate how the Department's test addresses the problem of price variability. Since an average is involved in the arm's length test, some individual sales will be above the average and some individual sales will be below the average. It is likely that some sales, though made at arm's length prices, will be found to be less than 99.5 percent of the average price of comparable products to unaffiliated customers, but will still be included in the normal value calculation because, based on the overall weighted average, sales to that affiliate pass the 99.5 percent test and are therefore deemed to be at arm's length. This result is the Department's normal practice under the arm's length test.

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[317] *See LTFV Final Determination*, 64 Fed. Reg. at 24342 **(Exh. JP-12)** ("by lowering the threshold for accepting affiliated party sales under their statistical approach from the Department's current standard, NKK's test would increase the likelihood of testing error when pricing to affiliated and unaffiliated customers is not the same (*i.e.*, the error of finding that affiliation has not affected price when, in fact, it has)").

227. The use of price averages inherently accounts for price variability. Thus, the Department's use of price averages and a 99.5 percent baseline for determining whether the sales were arm's length transactions for purposes of "ordinary course of trade," rather than running yet another statistical calculation in order to compute a standard deviation to use as the baseline, accounts for price variability in a reasonable and fair manner while maintaining the focus on the overall relationship between affiliated parties.

228. Japan also complains that the 99.5 percent test is unfair because "it tests only lower prices, and considers higher prices to be normal no matter how high."[318] For example, it asserts that where the arm's length price is $300 per ton, a weighted-average affiliated-party price of $298 per ton would be deemed outside the ordinary course of trade, while a price of $500 per ton would be considered ordinary.[319] This is not necessarily the case, since aberrationally high prices, as well as prices that do not pass the arm's length test, may be considered by the Department to be outside the ordinary course of trade.[320] The Japanese respondents in this case, however, have never contended that any of their affiliated-party sales prices were, in fact, aberrationally high. In any event, as Japan itself acknowledges, "{p}rices of downstream sales can only be higher than the prices of a producer's direct sales, in order to cover the additional transaction costs and profit."[321] Thus, this aspect of the Department's test cannot be unfair to respondents because they can only benefit from the fact that the structure of the arm's length test prevents some prices to affiliated home market customers from being replaced by what by their own admission would be higher prices to downstream customers. Furthermore, because the 99.5 percent arm's length test does not automatically reject all affiliated party sales, it is more favorable to the exporting country than the practices of Canada and Mexico, which always require the use of the higher downstream prices.

229. The 99.5 percent test imposes a reasonable requirement on affiliated party prices: on average, they essentially must be as high as prices to unaffiliated parties.[322] The test has been consistently applied in a reasonable manner by the Department for a number of years. In addition, the 99.5 percent test provides predictability, in that exporters fully understand the threshold at which their home market sales to affiliated customers will be considered arm's length transactions.

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[318] First Submission of Japan at para. 168.

[319] *Id.* at 48, para. 161.

[320] *See* the Statement of Administrative Action (SAA) at 834 (stating that examples of sales made outside the ordinary course of trade includes "merchandise sold at aberrational prices") **(Exh. US/B-37)**.

[321] First Submission of Japan at para. 170.

[322] *LTFV Final Determination,* 64 Fed. Reg. at 24342-43 **(Exh. JP-12)**.

The Department's approach is reasonable and thus represents a permissible interpretation of Article 2.1 of the Agreement.

### 3. Japan's Claim That Use of Downstream Sales Is Unfair Lacks Merit

230. Article 2.1 of the Agreement defines normal value as "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." Downstream sales of the like product to the first unrelated buyer for consumption in the home market clearly come within this definition. Hence, the Agreement authorizes the use of such downstream sales in the calculation of normal value.

231. Japan argues that the use of affiliates' downstream home market sales in lieu of sales to affiliated parties is not permitted by Articles 2.2 and 2.3.[323] In particular, Japan argues that, because Article 2.3 allows replacement of an exporter's sales to an affiliate with the affiliate's resales and Article 2.2 says nothing about replacement of home market sales to an affiliate with the affiliate's resales, the Agreement does not allow such replacement.[324] However, Article 2.2 discusses when to use third country sales and constructed value, and Article 2.2.1 deals only with sales below cost. Neither provision explains what to do when sales, such as affiliated-customer sales, are excluded for reasons other than being made at below cost prices. As noted above, Article 2.2.1 is not, nor was it ever intended to be, an exhaustive or even illustrative list of sales that could be considered outside the ordinary course. Therefore, the Agreement is subject to the permissible interpretation of the Department as to the use of home market downstream sales through affiliated customers.

232. Japan refers to the Latin maxim *expressio unius est exclusio alterius*, which can be a guide to the intent of the parties where it may be assumed that the parties, in listing a number of items but not others, deliberately intended to exclude the non-listed items.[325] Japan suggests that Article 2.3 evinces an intention of the parties to exclude the possibility that, where home market rather than export sales are "unreliable because of association," members could calculate normal value based on the price at which the foreign like product is "first resold to an independent buyer." However, it should be noted that *expressio unius est exclusio alterius*, as Lord McNair also remarked in his book excerpted by Japan at Exhibit JP-54, must be "applied with caution."[326]

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[323] First Submission of Japan at para. 170.

[324] *Id.* at 49, para. 164.

[325] *Id.*

[326] Lord McNair, *The Law of Treaties* 400 (1961) **(Exh. JP-54)**.

Indeed, the U.S. Supreme Court has noted that "the principle *expressio unius est exclusio alterius* 'is a questionable one in light of the dubious reliability of inferring specific intent from silence.'"[327] It is significant that the rules of the Vienna Convention do not refer to the maxim. The purpose of treaty interpretation is, as stated in Article 31 of the Vienna Convention, to give effect to the intention of the parties to the treaty as expressed in their words read in context.

233. Indeed, the context of Article 2.3 reveals that the provision is limited to export sales for reasons other than the prohibition of the use of downstream home market sales. First, it would have been redundant for Article 2.3 to refer to home market affiliated-party sales, which may already be rejected as outside "the ordinary course" and replaced by downstream sales pursuant to Article 2.1. Second, the purpose of Article 2.3 is to make explicit the authority to construct export price, as a prelude to discussing export sale adjustments in Article 2.4.[328] Thus, it cannot be inferred from the silence of Article 2.3 silence regarding home market sales that the parties intended to preclude the inclusion of downstream sales in the calculation of normal value.

234. Japan suggests that where affiliated customer sales are rejected as outside the ordinary course of trade, the Agreement requires the calculation of normal value on the basis of "sales to a third country" or "constructed value" rather than downstream sales.[329] However, such a practice would conflict with the Agreement's clear preference to calculate normal value based on home market sales prices. Article 2.2 plainly states that normal value may be based on third-country sales prices or on constructed value "when there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country, or when...such sales do not permit a proper comparison." Where downstream home market sales made in the ordinary course of trade exist, the Agreement permits their use, rather than the use of constructed value or third country sales. As explained below, downstream home market sales allow for a proper comparison here because the Department determined that home market sales were made at the same level of trade as the export transactions or adjustments were made as appropriate. Japan's proposed inference based on the *expressio unius est exclusio alterius* maxim is, therefore, inconsistent with this part of the Agreement.

235. Moreover, Japan's construction based on the *expressio unius est exclusio alterius* maxim could create absurd consequences in violation of Article 32(b) of the Vienna Convention. A

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[327] *Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 703 (1991) (quoting Cass R. Sunstein, Law and Administration After Chevron, 90 Colum. L. Rev. 2071, 2109, n. 182 (1990))* **(Exh. US/B-38)**

[328] Article 2.4 provides that "in the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made."

[329] First Submission of Japan at para. 162.

prohibition on the use of downstream sales to calculate normal value would enable producers in exporting countries to exclude from normal value all of their sales destined for consumption in the home market simply by making them through affiliated resellers. The absurd result would be that in every such case, normal value would have to be calculated based on third country sales or constructed value.

236. Finally, Japan argues that the downstream sales are at different levels of trade, and that the Department is not taking this factor into account in calculating normal value, such that a "fair comparison" under Article 2.4 is not being made with respondent's U.S. sales.[330] This is not so. The Department determines normal value based on sales in the comparison market at the same level of trade as the EP or CEP transaction, to the extent possible.[331] If the comparison market sales are at a different level of trade, the Department makes a level of trade adjustment under Section 773(a)(7)(A) of the Act, where appropriate.[332] In this case, the Department received no requests for level of trade adjustments, but nevertheless conducted a level of trade analysis.[333] Therefore, because the Department conducts a detailed level-of-trade analysis for use in making its prior to making the normal value calculation, considers level of trade in making its margin comparisons, and makes appropriate adjustment in accordance with Article 2.4, the alleged "apples-to-oranges comparison"[334] Japan claims takes place when the Department uses affiliates' downstream sales does not occur. Japan ignores these aspects in its submission to the Panel.

### 4. Conclusion

237. As made clear by Article 2.3 of the Agreement, affiliated party transactions are inherently suspect. For this reason, the United States, like many other countries, excludes as outside the ordinary course of trade those affiliated party sales not made at arm's length. The 99.5 percent test is analogous to the margin calculation, which itself is prescribed by the Agreement, and is therefore a perfectly reasonable methodology by which to determine whether affiliated party sales are in fact

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[330] First Submission of Japan at para. 165.

[331] 19 U.S.C. §1677b(a)(1)(B)(i); *see also Preliminary Determination*, 64 Fed. Reg. at 8297 **(Exh. JP-11)**.

[332] 19 U.S.C. §1677b(a)(7)(A); *see also Preliminary Determination*, 64 Fed. Reg. at 8297 **(Exh. JP-11)**.

[333] *See Department's Memorandum on Level of Trade*, (February 12, 1999) **(Exh. US/B-39)**; *see also LTFV Preliminary Determination,* 64 Fed. Reg. at 8297 **(Exh. JP-11)**.

[334] First Submission of Japan at para. 170; *see also Id.* at 47, footnote 145.

at prices below arm's length. Under the applicable standard of review, the Department's methodology must be upheld as a permissible interpretation of the Agreement.

## VI. The Department's Critical Circumstances Determination Was Consistent with Article 10 of the Anti-dumping Agreement

238. The remedy of imposing anti-dumping measures to counteract injurious dumping usually takes effect after an administering authority makes a preliminary determination of dumping and consequent injury to the domestic industry. However, the effectiveness of this remedy is seriously undermined if exporters are able to dump massive quantities of the subject merchandise prior to the imposition of provisional measures. For this reason, Articles 10.6 and 10.7 of the Anti-dumping Agreement provide that where such critical circumstances exist, anti-dumping duties may be imposed retroactively on imports that enter during the 90 days prior to the preliminary determination. Without these provisions for retroactive relief, exporters could dump massive quantities of their merchandise in anticipation of an investigation or as soon as the investigation is initiated with no risk of anti-dumping duties being imposed until the date of the preliminary determination.

239. In the petition filed in this case, the U.S. steel industry alleged that critical circumstances existed with respect to Japanese imports of hot-rolled steel and provided over 800 pages of extensive data, documentation, and analysis showing high levels of dumping, massive import surges, decreasing prices and public knowledge of the impending anti-dumping investigations due to the existing economic crisis. The Department promptly reviewed the allegations and the voluminous supporting facts and documentation, sought additional clarifying information, and on November 30, 1998, published an affirmative preliminary finding of critical circumstances pursuant to Section 733(e) of the Act, the U.S. statute which implements Articles 10.6 and 10.7 of the Anti-dumping Agreement. This "early" preliminary critical circumstances determination (i.e., prior to the issuance of the preliminary determination of dumping) was based upon the evidence contained in the petition and amendments thereto, the USITC preliminary determination of threat of injury, and other publicly available information before the Department at that time. However, although the Department issued the preliminary determination of critical circumstances prior to the issuance of the preliminary determination of dumping, it did not instruct the U.S. Customs Service to require bonds or any other security for the payment of estimated anti-dumping duties until after the preliminary determination of dumping. Additionally, because the USITC (in its final determination of injury) later found that critical circumstances did not exist, no definitive anti-dumping duties were ever assessed and all bonds were released and all cash deposits were refunded.

240. Nevertheless, Japan claims that the Department's "early" critical circumstances determination in this case was impermissible under Articles 10.6 and 10.7 of the Anti-dumping Agreement. Japan further claims that the standards governing preliminary critical circumstances determinations under Section 733(e) of the Act are inconsistent, on their face, with the requirements of Articles 10.6 and 10.7. As demonstrated below, each of the arguments asserted by Japan is without merit.

### A. Articles 10.6 and 10.7 of the Anti-dumping Agreement Permit Authorities to Take Measures Necessary for the Retroactive Application of Anti-dumping Duties at Any Time After the Initiation of an Investigation

241. Under the Anti-dumping Agreement, an administering authority normally may begin to take provisional anti-dumping measures with respect to entries of subject merchandise only after making an affirmative preliminary determination of dumping and injury to the domestic industry.[335] Thus, under normal circumstances, cash deposits or some other form of security may only be collected from the time of the preliminary determination,[336] and definitive anti-dumping duties are not imposed until the administering authority has made a final affirmative determination of dumping and injury.[337]

242. However, where critical circumstances exist, Articles 10.6 and 10.7 of the Agreement provide for the imposition of anti-dumping measures retroactively for a period of up to 90 days prior to the preliminary determination of dumping. The purpose of these provisions is to ensure that the anti-dumping remedy is not undermined by massive import surges that occur in anticipation of, or in response to, the initiation of an investigation.

243. Under Article 10.6 of the Agreement, an administering authority may impose anti-dumping duties retroactively if it finds that two conditions are satisfied. Specifically, the administering authority must find that:

(1) there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury; and

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[335] *See* Articles 7.1 and 10.1 of the Agreement.

[336] *See* Articles 7.1 and 7.2 of the Agreement.

[337] *See* Article 10.2 of the Agreement.

(2) the injury is caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports and other circumstances (such as rapid build-up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied, provided that the importers concerned have been given an opportunity to comment.

244. Article 10.7 of the Agreement further provides that "{t}he authorities may, *after initiating an investigation*, take such measures as the withholding of appraisement or assessment as may be necessary to collect anti-dumping duties retroactively, as provided in paragraph 6, *once they have sufficient evidence* that the conditions set forth in that paragraph are satisfied." (Emphasis added). Pursuant to Article 10.7, therefore, an administering authority may make a determination that critical circumstances exist and may take those measures that are necessary to secure potential definitive anti-dumping duties at any time after the initiation of an investigation.[338] The only restriction is that retroactive duties may not be applied to merchandise entered before the date on which the investigation was initiated.[339]

## B. The U.S. Critical Circumstances Statutory Provisions Are Consistent With Articles 10.6 and 10.7 of the Agreement

245. The U.S. statutory framework for critical circumstances determinations provides a remedy of retroactive anti-dumping duties to combat surges of dumped imports that is consistent with Article 10 of the Anti-dumping Agreement. Specifically, the U.S. statute governing preliminary determinations of critical circumstances closely follows Articles 10.6 and 10.7 of the Agreement.

246. As noted above, in order to provide an immediate response to import surges, Article 10.7 of the Agreement authorizes administrative authorities to take appropriate measures for the retroactive application of anti-dumping duties at any time after the initiation of an investigation if there is sufficient evidence that critical circumstances exist under Article 10.6. As such, Article 10.7 of the Agreement necessarily provides for an early or preliminary critical circumstances determination. Section 733(e) of the Act likewise

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[338] For example, an administering authority may, at any time after initiation, suspend liquidation (*i.e.*, withhold appraisement or assessment) of subject entries if there is sufficient evidence that critical circumstances exist under Article 10.6 of the Agreement.

[339] Article 10.8 of the Agreement.

provides for such an early or preliminary determination of critical circumstances under U.S. law. Specifically, Section 733(e) provides, in relevant part, as follows:

> SEC. 733. PRELIMINARY DETERMINATIONS
>
> (e) CRITICAL CIRCUMSTANCES
>
> (1) IN GENERAL. - If a petitioner alleges critical circumstances in its original petition, or by amendment at any time more than 20 days before the date of a final determination by the administering authority, then the administering authority *shall promptly (at any time after the initiation of the investigation under this subtitle) determine, on the basis of the information available to it at that time, whether there is a reasonable basis to believe or suspect that-*
>
> (A)(i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise, or
>
> (ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value, and that there was likely to be material injury by reason of such sales, and
>
> (B) there have been massive imports of the subject merchandise over a relatively short period.

(Emphasis added).

247. Section 733(e)(1) of the Act, in accordance with Article 10.7 of the Agreement, directs the Department of Commerce to make a preliminary critical circumstances determination based upon "the information available to it at that time." Thus, where a critical circumstances allegation is made, the Department will promptly and thoroughly analyze the facts in the allegation, the petition (including the section pertaining to injury to

the domestic industry),[340] the USITC preliminary determination of injury,[341] and other publicly available information (*e.g.*, press reports, U.S. Census Bureau and U.S. Customs Service data, etc.) to determine whether critical circumstances exist. If there is insufficient evidence of critical circumstances, the preliminary critical circumstances determination will be negative. However, if the record facts are reliable and are sufficient evidence of critical circumstances, the statute authorizes an affirmative preliminary determination of critical circumstances.

248. Finally, although Article 10.7 of the Agreement authorizes an administering authority to take measures, such as the withholding of appraisement or assessment of duties, at any time after the initiation of an investigation where critical circumstances are found, the U.S. statutory provision is more conservative. Section 733(e)(2) of the Act directs the Department of Commerce to take action upon an affirmative preliminary critical circumstances finding only at the time of the issuance of a preliminary determination of dumping.[342] Thus, although appraisement or assessment of entries of merchandise can properly be suspended prior to a preliminary determination under Article 10.7 of the

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[340] Indeed, even prior to initiating an antidumping investigation, the Department takes steps to confirm and corroborate the allegations and facts in the petition. *See, e.g., Initiation Checklist*, at 15 **(Exh. US/B-18)**.

[341] Shortly following the initiation of an anti-dumping investigation by the Department of Commerce, the International Trade Commission issues its preliminary finding regarding injury to the domestic industry. Thus, prior to issuing the preliminary determination of critical circumstances, the Department of Commerce will generally have the USITC's analysis of domestic injury.

[342] Section 733(e)(2) of the Act provides as follows:

> SEC. 733. PRELIMINARY DETERMINATIONS
> (e) CRITICAL CIRCUMSTANCES
> (2) SUSPENSION OF LIQUIDATION. - If the determination of the administering authority under paragraph (1) is affirmative, then any suspension of liquidation ordered under subsection (d)(2) shall apply, or, if notice of such suspension of liquidation is already published, be amended to apply, to unliquidated entries of merchandise entered or withdrawn from warehouse, for consumption on or after the later of-
>
> (A) the date which is 90 days before the date on which the suspension of liquidation was first ordered, or
> (B) the date on which the notice of the determination to initiate the investigation is published in the Federal Register.

Agreement, the U.S. statute restricts such measures.[343] In fact, in this case, no measures were taken on imports from the Japanese respondents prior to Commerce's Preliminary Determination.[344]

249. In sum, Section 733(e) of the Act provides for the Department to make a preliminary determination as to whether critical circumstances exist based on sufficient evidence in the record and consistent with the requirements of Articles 10.6 and 10.7 of the Anti-dumping Agreement. As demonstrated below, because the Department's preliminary critical circumstances determination in this case was made in accordance with Section 733(e) of the Act, it was fully in accordance with Articles 10.6 and 10.7 of the Agreement.

### C. The Department's Preliminary Determination of Critical Circumstances in this Case Was Fully in Accordance with Articles 10.6 and 10.7 of the Anti-dumping Agreement

250. Together with its petition seeking relief from injurious dumping, the U.S. hot-rolled steel industry provided extensive documentation and data showing high levels of dumping, massive import surges, decreasing prices, and public knowledge of the impending anti-dumping investigation. Consistent with its obligations under Articles 10.6 and 10.7 of the Anti-dumping Agreement and Section 733(e) of the Act, the Department promptly analyzed the evidence in the petition, the USITC's finding of threat of material injury and other publicly available data and preliminarily determined that critical circumstances existed based on the substantial evidence available to it.[345]

251. The petition in this case contained over 800 pages of data, documentation, and analysis, with approximately 700 pages of that being purely factual documentation. Such

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[343] Japan argues that the U.S. statute requires Commerce to wait until the preliminary determination of dumping because the Agreement requires such. *See* First Submission of Japan at 51, n.156. This contention is incorrect. As explained above, Article 10.7 of the Agreement clearly permits preliminary critical circumstances determinations at any time after initiation and provides that authorities may take necessary measures at that time. The fact that the U.S. statute directs Commerce to issue instructions to the Customs Service in the first instance at the preliminary determination of dumping is irrelevant to what is permitted by Article 10.7. Commerce only recently revised its policy to take advantage of the remedy provided by Article 10.7 (*i.e.*, early critical circumstances decisions), after finding that such policy was necessary in order to respond adequately to unfair import surges. *See Change in Policy Regarding Timing of Issuance of Critical Circumstances Determinations,* 63 Fed. Reg. 55364 (Oct. 15, 1998) ("*Critical Circumstances Policy Bulletin*") **(Exh. JP-3)**.

[344] *See LTFV Preliminary Determination*, 64 Fed. Reg. at 8299 **(JP-11)**.

[345] *Critical Circumstances Preliminary Determination*, 63 Fed. Reg. at 65751 **(Exh. JP-9)**.

documentation included an extensive Japanese market research report detailing actual transaction prices for hot-rolled steel in Japan (with product-specific information pertaining to physical characteristics, inland freight charges, packing costs and credit terms),[346] an actual offer for sale in the United States of Japanese-produced hot-rolled steel,[347] affidavits,[348] Harmonized Tariff Schedule and U.S. Census Bureau import statistics,[349] national and international press reports,[350] Financial Disclosure Reports on major Japanese producers (NSC, NKK, KSC and Sumitomo),[351] consulting firm reports regarding the domestic and foreign steel industries,[352] and published articles pertaining to metallurgy and steel-making.

252. Upon receiving the petition, the Department analyzed the evidence provided, and determined that additional explanation and factual information were needed. The Department thus sent the petitioners a questionnaire ("deficiency questionnaire") requesting, among other things, additional supporting documentation pertaining to claimed import

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[346] The original market research report in Exhibit 14 to Volume 1 of the petition contains sensitive business confidential information. **(Exh. US/B-40(a)).** A public summary of the exhibit has been provided ("*Public Summary of the Pricing Study on Japanese Hot-Rolled Carbon Steel Flat Products*") along with a Confidential Version of Figure 2 and Exhibit 16 to the petition, which includes ranged numbers. Both the *Public Summary* and the Confidential Version are attached at Petition Volume 1, Exhibit 14. **(Exh. US/B-40(a)).** As explained in the *Public Summary of the Pricing Study on Japanese Hot-Rolled Carbon Steel Flat Products,* "Exhibit 14 of the petition contains a pricing study on hot-rolled carbon steel flat products in the Japanese market. Specifically, it contains the actual transaction prices for hot-rolled carbon steel flat products produced and sold by Nippon Steel Corporation ("NSC") and Nippon Kokan ("NKK") . . . {and} a description of the methodology used to prepare the pricing study, which shows that a market researcher with decades of experience in Japan employed recognized research techniques to develop the data in the study and to cross-check those data to ensure maximum accuracy." *Public Summary of the Pricing Study on Japanese Hot-Rolled Carbon Steel Flat Products,* at 1-2. Petition, Volume 1 at Exhibit 14. **(Exh. US/B-40(a)).**

[347] *See* Petition, Volume 1 at Exhibit 7 **(Exh. US/B-40(a))**.

[348] *See, e.g.*, Petition, Volume 1 at Exhibits 7, 13 **(Exh. US/B-40(a))**; Volume 2 at Exhibit 14, **(Exh. US/B-40(b))**.

[349] *See, e.g.,* Petition, Volume 1 at Exhibits 4-6, 1, **(Exh. US/B-40(a))**; Volume 2 at Exhibits 1-3 **(Exh. US/B-40(b))**; Volume 3 at Exhibit 6 **(Exh. US/B-40(c))**.

[350] *See, e.g.*, Petition, Volume 2 at Exhibits 7-8, 11, 16, 20, 24, 25, 40, **(Exh. US/B-40(b))**; Volume 3 at Exhibits 1-5, 9, **(Exh. US/B-40(c))**.

[351] *See*, Petition, Volume 2 at Exhibits 28-31, **(Exh. US/B-40(b))**.

[352] *See* Petition, Volume 2 at Exhibits 17 and 39 **(Exh. US/B-40(b))**.

volumes, material injury, and knowledge by Japanese producers of the potential investigation.[353] In response to the deficiency questionnaire, the petitioners filed amendments to the petition on October 9, 1998 and October 14, 1998 containing additional supporting documentation as requested.

253. In reaching its preliminary determination as to whether critical circumstances existed, the Department recognized the need to ensure that the anti-dumping remedy was not undermined in this case by a sudden flood of massive imports. Based on the evidence before it, the Department found a massive surge in import volumes in which "imports of hot-rolled steel from Japan increased by more than 100 percent."[354] This was more than six times greater than the 15 percent increase needed to establish massive imports under the Department's established practice.[355] The Department also found that importers knew or should have known both that the respondents were selling the subject merchandise at less than fair value and that there was likely to be material injury.[356] It based this determination on the fact that the dumping margins documented in the petition were in excess of 25 percent, on the USITC's preliminary determination of threat of injury, and on other publicly available information, including "numerous press reports . . . regarding rising imports, falling domestic prices resulting from rising imports, and domestic buyers shifting to foreign suppliers."[357] It also considered comments submitted by the respondents on this issue.[358] In other words, the Department determined that it was proper to issue a preliminary affirmative determination of critical circumstances only after analyzing the volume of corroborated evidence showing that critical circumstances existed and in recognition of the need for immediate action. Its determination was supported by sufficient evidence and was consistent with Articles 10.6 and 10.7 of the Anti-dumping Agreement.

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[353] *See* Letter from the Department to Skadden, Arps, Slate, Meagher & Flom LLP (October 6, 1998), **(Exh. US/B-41)**.

[354] *Critical Circumstances Preliminary Determination*, 63 Fed. Reg. at 65751**(Exh. JP-9)**.

[355] *Id.* at 65750; *see also* 19 C.F.R. § 351.206(h)(2).

[356] *Critical Circumstances Preliminary Determination*, 63 Fed. Reg. 65750 **(Exh. JP-9)**; *Preliminary Critical Circumstances Memo* at 2-4 **(Exh. US/B-42)**.

[357] *Id.*

[358] *See Preliminary Critical Circumstances Memo* at 3 (discussing the respondents' contentions regarding the existence of critical circumstances) **(Exh. US/B-42)**.

254. Japan argues that the Department's determination of critical circumstances violated the Agreement in that: (1) a preliminary critical circumstances determination must be based on a preliminary finding of current material injury, rather than threat of injury; (2) Commerce's determination was not supported by sufficient evidence as required by Article 10.7 of the Agreement; and (3) the standards for critical circumstances determinations in the U.S. statute, on their face, fail to meet the standards in Articles 10.6 and 10.7 of the Agreement.[359] As we show below, each of these arguments is without merit.

### 1. Article 10.6 of the Agreement Does Not Prohibit a Finding of Critical Circumstances Where There is a Threat of Injury to a Domestic Industry

255. Japan claims that Commerce "ignored" the USITC's determination of no current material injury and dismissed the USITC's expertise in injury determinations when it issued its affirmative critical circumstances determination. Japan further argues that Article 10.6 of the Agreement limits the application of retroactive anti-dumping duties to situations where there is present injury, not threat of injury. These arguments lack any support. First, the Department of Commerce did not ignore the USITC's determination. In fact, Commerce relied on the USITC's determination of threat of injury and the findings set forth in that determination. Second, Commerce's reliance on the USITC's finding of threat and other supporting factual information was consistent with Article 10.6 of the Agreement.

256. Japan argues that Article 10.6 requires a finding of current material injury in order to issue a preliminary determination of critical circumstances. However, Articles 10.6 and 10.7 specifically authorize preliminary critical circumstances determinations and the suspension of assessment or other measures in instances where there is threat of material injury. Article 10.6 authorizes the imposition of retroactive duties where "(i) there is a history of dumping *which caused injury* or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping *would cause injury*, and (ii) *the injury* is caused by massive dumped imports . . . ." (Emphasis added). Article 3, footnote 9 of the Agreement expressly states that "the term 'injury' shall, *unless otherwise specified*, be taken to mean material injury to a domestic industry, *threat of material injury* to a domestic industry or material retardation of the establishment of such an industry. . ." (Emphasis added). Article 10.6 does not "otherwise specify" that threat of material injury is not included within the meaning of injury for purposes of critical circumstances determinations. Thus, consistent with Article 3, footnote 9, the term injury in Article 10.6 must include threat of material injury.

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[359] First Submission of Japan at 50.

257. Japan notes that other Article 10 provisions do specify a distinction between injury and threat of injury. In particular, Japan stresses that Article 10.2 distinguishes between "injury" and "threat thereof."[360] However, this argument actually supports the Department's determination in this case. Indeed, while it is true that Article 10.2 distinguishes "injury" from "threat," this merely emphasizes the fact that Articles 10.6 and 10.7 do not specify such a distinction. In contrast to Article 10.2, there is no exclusion of threat in Article 10.6.[361]

258. Japan further argues that, under Article 10.2, "retroactive duties may be levied after finding threat only if there would have been a final injury determination absent provisional measures."[362] Thus, Japan suggests that the preliminary determination in this case (based in part on the USITC's determination of threat of injury) was in error, because retroactive duties may only be applied if there is a determination of current injury. Japan confuses the application of Article 10.2 in two respects. First, Article 10.2 applies to "final" determinations regarding injury and speaks to the situation where an administering authority finds only threat of injury in its final determination. Japan is challenging Commerce's reliance on a finding of threat of injury for purposes of its *preliminary* determination, not its final determination. In this respect, Article 10.2 is not applicable. More importantly, the USITC's final determination in this case included an *affirmative finding of current material injury*.[363] Thus, the discussion relating to threat of injury in Article 10.2 is not even pertinent here.[364]

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[360] *See* Article 10.2 of the Anti-dumping Agreement.

[361] Quoting from the Law of Treaties, Japan argues that "{u}nder a general principal of treaty interpretation, by specifying 'injury,' the Agreement excludes alternative concepts such as 'threat of injury.'" First Submission of Japan at 56 (*citing generally* Lord McNair, *The Law of Treaties* 399-410 (1961) **(excerpts in Exh. JP-54)** for the proposition: "Expressio unius est exclusio alterius (to specify one thing implies the exclusion of another)."). This principle, however, does not apply where, as here, the language of the Agreement specifically states that to specify one thing (*i.e.*, injury) implies the *inclusion* of another (*i.e.*, threat of material injury). *See* Article 3 n. 9 of the Agreement. Thus, contrary to Japan's argument, the presumption is that threat of injury is included within the meaning of injury, unless a particular provision specifically excludes it. Article 10.6 does not specifically exclude threat of material injury.

[362] First Submission of Japan at 56 (emphasis in original).

[363] *Certain Hot-Rolled Steel Products From Japan*, 64 Fed. Reg. 33514 (June 23, 1999), **(Exh. JP-13)**

[364] Article 10.2 addresses the application of retroactive duties generally and does not specifically apply to situations involving critical circumstances.

259. Japan similarly cites to Article 10.4, arguing that remedies for threat of injury should be prospective only. Again, however, Article 10.4 speaks only to the application of "definitive" anti-dumping duties after a *final* determination is issued.[365] Thus, in instances where there is a final determination of threat of injury, but no current injury, "definitive anti-dumping dut{ies}" may only be imposed prospectively from the date of the determination of threat of injury. For the same reasons noted above with respect to Article 10.2, Article 10.4 also does not apply here.

260. In fact, the language in Article 10.4 indicates that even where there is only a preliminary finding of threat of injury, provisional measures *are* proper. By suggesting that all cash deposits collected prior to the final determination of threat must be *refunded*, the provision necessarily implies that the provisional measures (*e.g.*, collection of cash deposits) - even where they were based upon a preliminary finding of threat of injury - were appropriate when imposed. In sum, because Articles 10.2 and 10.4 apply to situations not present here (*i.e.*, *final* determinations of threat of injury), Japan's argument that "{i}t makes no sense to interpret Article 10.6 broadly as allowing precisely the type of retroactivity that Articles 10.2 and 10.4 seek to prevent,"[366] is without merit.

261. Finally, Japan argues that Commerce improperly reversed its practice when it began issuing affirmative critical circumstances determinations in 1997 in cases where the USITC preliminarily found only threat of injury. Specifically, Japan cites *Brake Drums and Brake Rotors From the People's Republic of China*, in which the Department stated that in instances in which the USITC has found only threat of material injury, "it is not reasonable to conclude that an importer knew or should have known that its imports would cause material injury."[367] Japan is essentially arguing that the Department changed its policy three years ago and, since that time, has been improperly relying on threat of injury as a sufficient factor for imputing knowledge. Japan's argument fails for several reasons. First, it is not a violation of the Anti-dumping Agreement for an authority to formulate and revise its policies in the course of administering the Agreement. The *Brake Drums and Brake Rotors* case was one of the first critical circumstances decisions in which the Department applied the new law implementing the Agreement. In June 1997, less than four months after the Department issued the *Brake Drums and Brake Rotors* decision, the Department broadened the criteria used in determining whether knowledge of injury exists for purposes of critical

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[365] Article 10.4 of the Anti-dumping Agreement.

[366] *See* First Submission of Japan at 57.

[367] *Brake Drums and Brake Rotors From the People's Republic of China,* 62 Fed. Reg. 9160, 9164 (Feb. 28, 1997) (final determination) **(Exh. US/B-44)**.

circumstances determinations. In *Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China*, the Department explained that in instances in which the USITC preliminarily found threat of injury, it would consider that finding as well as other evidence in determining whether a reasonable basis exists to impute knowledge of injury.[368]

262. Thus, the Department's current policy is to consider *both* the USITC's finding of threat of injury *and* other evidence on the record in deciding whether to impute knowledge of injury. As the Department explained in this case:

> If, as in this case, the USITC preliminarily finds threat of material injury . . ., the Department's practice is to consider additional information such as the extent of the increase in the volume of the subject merchandise during the critical circumstances period and the magnitude of the margins, in determining whether a reasonable basis exists to impute knowledge that material injury was likely.[369]

The Department's policy therefore meets the requirements of Articles 10.6 and 10.7 of the Agreement with respect to imputing knowledge of injury. In this case, because the Department's reliance on the USITC finding of threat of injury and the other substantial evidence before it in deciding whether to impute knowledge of injury was permissible under Articles 10.6 and 10.7, Japan's argument to the contrary should be rejected.

### 2. The Department's Preliminary Determination of Critical Circumstances Was Supported by Sufficient Evidence Under Article 10.7

263. Japan argues that Commerce violated Article 10.7 of the Agreement because it did not base its preliminary critical circumstances determination on sufficient evidence that: (1) the importer was, or should have been, aware that the exporter practiced dumping and that such dumping would cause injury; (2) the injury was caused by massive dumped imports of a product in a relatively short time; and (3) the massive dumped imports were likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied.

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[368] *Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China*, 62 Fed. Reg. 31972, 31978 (June 11, 1997) (preliminary determination) **(Exh. US/B-45)**.

[369] Preliminary Critical Circumstances Memo at 2 (*citing Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China*, 62 Fed. Reg. at 31978) **(US/B-42)**.

As we demonstrate below, however, the Department had sufficient evidence regarding all of these factors.

### a. The "Sufficient Evidence" Standard

264. The panel in *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup from the United States* ("*HFCS*") recently interpreted the "sufficient evidence" standard in the context of determining whether an anti-dumping investigation was properly initiated. In that case, the panel explained that to determine whether there is sufficient evidence for purposes of initiating an investigation, a panel must examine "whether an unbiased and objective investigating authority evaluating that evidence could properly have determined that sufficient evidence of dumping, injury and causal link existed to justify initiating the investigation."[370] Accordingly, under the interpretation of the "sufficient evidence" standard set forth in *HFCS*, the question in this case is whether an unbiased and objective investigating authority evaluating the evidence could properly have determined that sufficient evidence of critical circumstances existed for purposes of making a preliminary determination under Article 10.7.

265. In addition, pursuant to the principles of treaty interpretation set forth in Article 31(1) of the Vienna Convention, the "sufficient evidence" standard in Article 10.7 of the Anti-dumping Agreement must be read within the context in which it is applied and in light of its object and purpose.[371] The evidentiary standard for reviewing the sufficiency of preliminary determinations like that at issue here must necessarily be lower than that applied to final determinations because of the greater opportunity to engage in more complete fact gathering and analysis leading up to a final determination. This is even more so the case here where, under the express provisions of Article 10.7 of the Agreement, administering authorities are permitted to make preliminary critical circumstances determinations and take measures at any time "after initiating an investigation."

266. Japan suggests that a critical circumstances determination is not proper unless it takes into account all of the responses of the foreign producers. However, by the time an authority is able to analyze and verify all of the factual data submitted by foreign producers, it may be too late to provide the remedy afforded in Article 10.7. By enacting Article 10.7, the signatories to the Anti-dumping Agreement determined that, under certain urgent circumstances, it is appropriate to take immediate measures in order to prevent import

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[370] *HFCS*, WT/DS132/R, Report of the Panel adopted on January 28, 2000, at para. 7.94, 7.95.

[371] *See* Article 31(1) of the Vienna Convention.

surges and to secure potential duties (later refundable if the final determination is negative). In other words, if at the time of a critical circumstances allegation (*i.e.*, any time after initiation), there is sufficient evidence in the record of an import surge (accompanied by other Article 10.6 circumstances), the administering authority may take necessary measures.[372] In providing for early critical circumstances determinations prior to a preliminary determination of dumping, the United States has acted in accordance with the express provisions of Article 10.7. Indeed, the United States has implemented Article 10.7 consistently with Thailand, which has also enacted a similar provision in its anti-dumping laws.[373]

267. In sum, the "sufficient evidence" standard in Article 10.7 must be read in its context and in light of the purpose of Article 10.7 in providing for early critical circumstances determinations in urgent circumstances. As is demonstrated below, Commerce's early preliminary critical circumstances determination in this case was based upon the substantial evidence available to it in the form of the literally hundreds of pages of factual documentation attached to the petition and the amendments thereto as well as the additional news articles, import data, and other publicly available information obtained by Commerce. Commerce's determination therefore satisfied the "sufficient evidence" standard of Article 10.7.

### b. Evidence of Importer Knowledge of Dumping

268. With respect to the question of whether importers had knowledge of dumping, the Department relied on the margins set forth in the petition. In attacking the Department's actions here, Japan repeatedly claims that Commerce "blindly" relied on "mere allegations" in the petition to support the preliminary critical circumstances determination. However, the approximately 700 pages of exhibits submitted with the petition and the amendments thereto are not mere allegations - they are evidence.

269. The petition established that estimated margins for NSC and NKK were 27.20 percent and 28.25 percent, respectively. The basis for the margins was set forth in extensive exhibits contained in the petition. Specifically, in order to establish the "export price"

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[372] Japan further argues that because early preliminary determinations have a "chilling effect" on trade, they should be subject to more serious scrutiny. *However, this is the precise purpose of Article 10.7 - to halt pre-order surges of massive dumped imports.* Given this objective, the Anti-dumping Agreement permits provisional measures where there is a finding of sufficient evidence of certain facts. This is the standard that should be applied, regardless of any potential "chilling effect."

[373] *See* Anti-Dumping and Countervailing Act B.E. 2542, art. 31 (Tha.) **(Exh. US/B-43)**.

("EP"), the petition provided an actual offer for sale in the United States of Japanese-produced hot-rolled steel.[374] Additionally, in accordance with the Department's practice for calculating EP, the petition estimated appropriate adjustments to the gross price, subtracting amounts for the following expenses:[375] foreign inland freight charges;[376] ocean freight and insurance; unloading and wharfage;[377] a U.S. trading company mark-up;[378] a Japanese trading company mark-up;[379] and U.S. Customs duties and fees.[380] In order to establish the "normal value" ("NV") for comparison purposes, the petition provided actual transaction prices in Japan for the product that was most similar to the product used to establish EP.[381] Consistent with Department practice for determining NV, the petition further subtracted amounts for inland freight charges, packaging expenses, and credit expenses.[382]

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[374] *See* Petition, Volume 1 at Exhibit 7 **(Exh. US/B-40(a))**.

[375] *See* Petition Volume 1 at p. 10, Figure 1 **(Exh. US/B-40(a))**.

[376] The basis for calculating foreign inland freight charges was contained in the Japanese market research report attached as Exhibit 14 to the petition. *See* Petition Volume 1 at Exhibit 14 **(Exh. US/B-40(a)).**

[377] In order to determine ocean freight, insurance, unloading and wharfage, petitioners provided data from the U.S. Census Bureau and U.S. Customs Service regarding such charges. *See* Petition, Volume 1 at Exhibits 11-12 **(Exh. US/B-40(a))**.

[378] The petition included an industry expert affidavit detailing the typical mark-up for U.S.-based trading companies. The affidavit further detailed the affiant's background and experience with such matters. *See* Petition, Volume 1 at Exhibit 13, **(Exh. US/B-40(a))**.

[379] The basis for calculating the Japanese trading company mark-up was contained in the Japanese market research report. Petition Volume 1 at Exhibit 14 **(Exh. US/B-40(a))**.

[380] The basis for U.S. Customs duties and fees was derived from the 1997 U.S. Harmonized Tariff Schedule. *See* Petition, Volume 1 at Exhibit 4 **(Exh. US/B-40(a))**.

[381] The basis for determining NV was contained in the Japanese market research report attached as Exhibit 14 to the petition. *See Public Summary of the Pricing Study on Japanese Hot-Rolled Carbon Steel Flat Products,* at 1-2, with a Confidential Version of Figure 2 and Exhibit 16 of the petition attached thereto (which includes ranged numbers), Petition, Volume 1, at Exhibit 14. **(Exh. US/B-40(a)).**

[382] The basis for determining these expenses was contained in the Japanese market research report. *See id.*

270. Based upon this factual information, after having closely scrutinized the petition for accuracy and sufficiency at initiation,[383] the Department determined that the margins in the petition provided a sufficient basis for imputing importer knowledge of dumping.[384] Specifically, the Department determined that "{b}ecause the estimated dumping margins calculated in the petition - 27.20 and 28.25 percent - are greater than 25 percent, we may impute knowledge of dumping."[385]

271. Japan does not contest the Department's "25 percent margin test" for determining whether importers were, or should have been, aware that dumping was occurring. Rather, Japan takes issue with the Department's decision to use the margins set forth in the petition. Japan suggests that the Department should have waited and relied on the margins calculated in the Preliminary Determination because those margins included an analysis of the respondents' submissions. However, as demonstrated above, the petition margins were derived from extensive evidence that was sufficient to determine that importers knew, or should have known, of the dumping. Because the Anti-dumping Agreement does not dictate how an administering authority is to determine importer knowledge of dumping and because the Department's approach in this case was both reasonable and predictable, and is certainly a permissible interpretation of the Agreement.

272. Finally, it is important to note that Japan did not contest the sufficiency of the petition evidence for purposes of initiation of the investigation. While the United States agrees that the standard for initiation is less stringent than that for a preliminary determination, Japan apparently recognized that, for purposes of initiation, the evidence constituted more than "mere allegations." In accordance with Articles 5.2 and 5.3 of the

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[383] When determining whether to initiate the investigation, the Department sought to ensure that the allegations were properly supported by factual documentation, *i.e.*, evidence. *See Initiation Checklist* at 6-8 **(Exh. US/B-18)**. Specifically, the Department inquired as to whether the petition contained sufficient supporting documentation of: volume and value of imports; U.S. market share (*i.e.*, the ratio of imports to consumption); actual pricing (*i.e.*, evidence of decreased pricing); relative pricing (*i.e.*, evidence of imports under-selling U.S. products); prices or costs and claimed adjustments; market research reports and affidavits referring to sources of how information was obtained; current price data (no more than one year old); price and cost data from contemporaneous time periods; correct currency rates used for all conversions to U.S. dollars; and conversion factors for comparisons of differing units of measure. *Id.* Additionally, the Department further assessed the reliability of the factual support provided in the petition by comparing the evidence with publicly available data. *Id.* at 15-16.

[384] *See Critical Circumstances Preliminary Determination*, 63 Fed. Reg. at 65750 **(Exh. JP-9)**; *Preliminary Critical Circumstances Memo* at 2 **(Exh. US/B-42)**.

[385] *Preliminary Critical Circumstances Memo* at 2 **(Exh. US/B-42)**.

Anti-dumping Agreement, "{s}imple assertion{s}, unsubstantiated by relevant evidence, cannot be considered sufficient" to establish a basis for initiation of an investigation, and authorities must "examine the accuracy and adequacy of the evidence provided in the application to determine whether there is *sufficient evidence* to justify the initiation of an investigation."[386] Japan did not challenge, in any way, the sufficiency of the evidence leading to initiation (*e.g.*, the Petition exhibits). Now, however, Japan argues that the record contained nothing more than unsubstantiated allegations. If Japan truly believed that the Petition contained no supporting evidence whatsoever, it would have challenged the Department's determination to initiate the investigation.

### c. Evidence of Importer Knowledge of Injury

273. For purposes of determining importer knowledge that injury would result from the dumped imports, the Department analyzed the USITC's determination of threat of material injury, the enormous increase in the volume of Japanese imports of the subject merchandise during the critical circumstances period,[387] the magnitude of the margins, information in the petition regarding injury to the domestic industry,[388] and numerous press reports regarding

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[386] Articles 5.2 and 5.3 of the Anti-dumping Agreement.

[387] The Department specifically found that "imports of Japanese hot-rolled steel increased 101 percent during the period May - September 1998 (as compared to December 1997 - April 1998), or over six times the level of increase needed to find 'massive imports' during the same period." *Preliminary Critical Circumstances Memo* at 3 **(Exh. US/B-42)**. This information was derived from U.S. Census Bureau import statistics. *See id* at Attachment 2.

[388] In addition to Volume 1 of the petition relating specifically to "Critical Circumstances," the petition contained a separate volume, Volume 2, pertaining to "Injury." Both volumes contained extensive documentation showing that Japanese steel producers were, or should have been, aware that the flood of imports into the United States was causing injury to the U.S. hot-rolled steel industry. For example, Volume 2 of the petition included multiple industry-related articles discussing the Japanese financial crisis, the flood of imports into the United States, and the resulting price erosion on those products. *See, e.g.*, Petition, Volume 2 at Exhibit 8, "Nucor Cuts Flat-Roll, Galvanized Again," *American Metal Market*, September 11, 1998 ("For the second time in less than two months, Nucor Corp., Charlotte, N.C., is lowering prices on hot-rolled and cold-rolled sheet in the face of rising imports. . . . Obviously, we're doing this because of imports, said . . . Nucor's chairman."); Petition, Volume 2 at Exhibit 9, *Hotline Transaction Prices,* September 1, 1998 (demonstrating a general fall in prices during the relevant period); Petition, Volume 2 at Exhibit 11, "Low Prices Force Nucor to Cut Production," *Metal Bulletin*, September 7, 1998 ("Nucor has cut production . . . in response to low market prices. . . . Nucor reduced . . . weekly operations from seven days to four because of market turmoil in the wake of a flood of cheap imports."); Petition, Volume 2 at Exhibit 15, *Morgan Stanley Dean Witter Industry Report*, July 21, 1998 ("Because of an increase in low-priced flat-rolled imports, we are assuming that flat-rolled prices will break down in late September or early October . . . ."); Petition, Volume 2 at Exhibit 16, "Steel Imports to U.S. Set Record in July; Japan Claims Its

rising imports, falling domestic prices as a result of the imports, and domestic buyers shifting to foreign suppliers.[389] The Department determined that this evidence overwhelmingly supported a finding that importers were, or should have been, aware that injury would be caused by reason of dumped imports.[390] This determination was supported by sufficient evidence on the record in accordance with Article 10.7 of the Agreement.

274. Japan argues that because the USITC found no present material injury, Commerce could not impute knowledge of injury to the importers. Specifically, Japan argues that under Article 10.6 of the Agreement, it was necessary for importers to have known that the dumping was causing *present injury*. This contention is simply incorrect. Article 10.6 specifically states, in pertinent part, that an affirmative critical circumstances determination may be made where an authority finds that "the importer was, or should have been, aware that the exporter practises dumping and that such dumping *would* cause injury . . . ." (Emphasis added). The use of the word "would" necessarily implies that there need not be knowledge of *present injury* for purposes of a critical circumstances determination under Article 10.6. In fact, as discussed in detail above, the term "injury," unless otherwise

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Shipments Are Slowing," *Wall Street Journal,* September 21, 1998 ("'Japanese steel is just murdering' the U.S. steelmakers"); Petition, Volume 2 at Exhibit 17, "Nucor Cuts List Prices of Steel Sheet - Sheet Prices Sure to Decline for All Domestic Producers," *PaineWebber,* September 16, 1998 ("We expect the U.S. flat-rolled steel pricing outlook to continue to deteriorate for the remainder of 1998. Imports are likely to remain high. World prices are well below U.S. prices."); Petition, Volume 2 at Exhibit 18, "Analyst Interview - Steel: An Obtuse Approach," *Wall Street Transcript Corporation,* July 29, 1998 (Question: "You say that imports are too large to be comfortable. Does this suggest that some steel has once again been 'dumped'?" Answer: "During 1997, record levels of steel product imports came in the U.S. . . . Despite the highest level of domestic steel consumption observed in several decades, the price of steel products declined during 1997. Imports were simply so large, and prices at which they entered markets so low, that steel pricing was compromised."); Petition, Volume 2 at Exhibit 24, Weekly Steel Analysis, *World Steel Dynamics,* June 11, 1998 ("1998 is shaping up to be a bad year."); Petition, Volume 2 at Exhibit 25, Weekly Steel Analysis, *World Steel Dynamics,* July 16, 1998 ("The Japanese yen has weakened recently . . . . At current exchange rates, the Japanese are shipping an ever wider variety of steel products to the United States at a significant price discount to U.S. price levels."); Petition, Volume 2 at Exhibit 39, "Steel Industry Conditions Still Worsening in the United States and Abroad," *PaineWebber,* Sept. 8, 1998, ("World export prices in recent weeks have fallen even further . . . Prices in many cases are now below the marginal costs of many producers. The 'death spiral,' which in our view is sure to extinguish some present and planned steelmaking capacity, is in full force."). All of the cited articles are included in **Exh. US/B-40(b)**.

[389] *Id.*

[390] *See Critical Circumstances Preliminary Determination*, 63 Fed. Reg. at 65750 **(Exh. JP-9)**; *Preliminary Critical Circumstances Memo* at 2-3, **(Exh. US/B-42)**.

specified, includes "threat of material injury."[391] Thus, the Department's reliance on the USITC's finding of threat of material injury, along with other relevant record information, in finding importer knowledge of injury in this case was consistent with the Agreement.

### d. Evidence that the Injury Was Caused by Massive Imports Over a Relatively Short Period of Time

275. Japan does not argue here that the Department failed to make its massive imports determination based upon sufficient evidence. Rather, Japan takes issue with the comparison period selected by the Department to determine whether there was a massive surge of imports. Seemingly, Japan concedes that if the comparison period selected is appropriate, then the imports were indeed massive.

276. The Anti-dumping Agreement provides that for a critical circumstances determination to be issued, massive dumped imports must have occurred "in a relatively short period of time."[392] It is indisputable that a 100 percent increase in imports from one six-month period to the next, and continuing at that high level through the date of initiation of the investigation, is a massive increase over a relatively short period. Japan argues, however, that having established a different time period as the "normal" (but by no means absolute) period for analysis in its regulations, the Department was precluded from changing that period.

277. There is no basis for this claim. Section 351.206(i) of the Department's regulations provides that the Department will "normally" compare the three months following initiation of an investigation to the three months preceding initiation in order to determine whether critical circumstances exist.[393] These comparison periods are appropriate where companies learn of the investigation when it is initiated and then try to beat the preliminary determination with a surge of imports of the subject merchandise. However, Section 351.206(i) provides that if the Department finds that importers, exporters, or producers had reason to believe, at some point prior to the beginning of the proceeding, that an investigation was likely, the Department may consider a period of not less than three months from that earlier time for comparison purposes.[394]

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[391] Article 3, n. 9 of the Anti-dumping Agreement.

[392] Article 10.6(ii) of the Anti-dumping Agreement.

[393] 19 C.F.R. § 351.206(i).

[394] *Id.*

278. In this case, beginning in December 1997 and continuing through the filing of the petition in September 1998, there was a steady stream of national and international press reports concerning surges in steel imports from Asia, drops in steel prices, and meetings of steel producers and importers where parties discussed the possibility of the filing of trade cases by the U.S. industry. In particular, in Spring 1998, there were a significant number of press reports discussing concerns of steel producers and others about the influx of imports from Asia and the likelihood of unfair trade actions due to the significant increases in low-priced steel.[395] Thus, it was reasonable for the Department to conclude that importers knew of the impending anti-dumping investigation and, consequently, would build-up inventories in order to avoid potential anti-dumping liabilities. The petitioners' decision to await filing the petition until they had sufficient evidence should not deprive them of their remedy against a massive surge of imports that occurred in anticipation of an anti-dumping investigation. Accordingly, the Department properly applied Section 351.206(i) of its regulations in selecting the comparison period it used here to determine whether there was a massive surge of imports.

279. Nothing in the Anti-dumping Agreement dictates the selection of a different comparison period here. Indeed, the Agreement does not specify how to determine whether

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[395] *See Preliminary Critical Circumstances Memo* at 3 **(Exh. US/B-42)**; *see also* Petition, Volume 3 at Exhibit 5, "July U.S. Steel Imports Hit Record," *Japan Economic Newswire,* September 19, 1998 ("he also said that importers accelerated deliveries in anticipation of domestic steelmakers' action, expected within this month, to file charges against foreign producers for what they believe is the dumping ... of steel products in the United States"); Petition, Volume 3 at Exhibit 9, Chris Adams, "Rising Imports Distress U.S. Steelmakers", *The Wall Street Journal,* Sept. 8, 1998 ("steelmakers are expected to accelerate plans to file trade complaints with the U.S. Department of Commerce and the U.S. International Trade Commission."); Petition, Volume 2 at Exhibit 16, "Steel Imports to U.S. Set Record in July; Japan Claims Its Shipments Are Slowing," *Wall Street Journal,* September 21, 1998 ("Already U.S. steelmakers have said they will file complaints with the Commerce Department and the U.S. International Trade Commission against countries they say are selling steel in the U.S. at unfairly low prices. Although industry spokesman haven't specified which countries will be targeted, people with knowledge of their plans say Japan and Russia are expected to be among those included."); Petition, Volume 3 at Exhibit 3, *CRU Monitor: Steel* ("Japanese integrated steelmakers remain worried about possible anti-dumping actions from local producers . . . ."); "US Dumping Actions on the Horizon?," *World Steel Dynamics,* April 30, 1998 ("World Steel Dynamics sees a fair to good possibility that some mills in the United States could file trade suits against foreign mills perhaps as early as the third quarter of 1998 . . . ."); Keith Darce, "Cheaper Asian Steel Imports Are on the Rise," *The Times-Picayune*, May 6, 1998 (noting that if Asian steel is imported below productions costs, dumping charges could be filed); Petition, Volume 3 at Exhibit 4 "More Steel Trade Cases Said Likely," *American Metal Market,* May 7, 1998 ("Steel buyers, convinced that U.S. trade laws as well as the complaint process in Washington are stacked against their offshore producers, expect domestic mills to continue using this weapon against imports."); Petition, Volume 3 at Exhibit 5, *Metal Bulletin,* Sept. 24, 1998 ("US industry executives were in Washington last week to discuss unfair trade cases . . . ."). All of the cited articles are included in **Exh. US/B-40(c)**.

massive imports existed. The Department's actions under its regulations in this case reflect a reasonable method for implementing the Agreement and should be sustained by the panel.[396]

#### e. Evidence that the Imports Were Likely to Seriously Undermine the Remedial Effect of Imposing Anti-Dumping Duties

280. In reaching its preliminary determination of critical circumstances, the Department plainly considered whether the massive surge of imports from Japan that it found was likely to seriously undermine the remedial effect of an anti-dumping duty order. Simply because the U.S. statute does not specifically mention this element does not mean that the Department does not consider it. Indeed, it was an integral part of the Department's analysis in this case, as it is in all cases.

281. The Department's recent policy bulletin relating to the timing of the issuance of critical circumstances determinations makes clear that "the purpose of {the critical circumstances} provision is to ensure that the statutory remedy is not undermined by massive imports following initiation of an investigation."[397] In fact, as required by Article 10.6(ii) of the Anti-dumping Agreement, the Department specifically looks to the timing and volume of the dumped imports to determine whether critical circumstances exist. In this case, only after finding that there indeed was a massive surge of dumped imports (100 percent increase) during the relevant time period (*i.e.*, once importers learned of the impending anti-dumping investigation), the Department determined that critical circumstances existed. In other words, the Department necessarily found that without retroactive application of provisional measures, the ultimate anti-dumping duty would be undermined. A separate finding of this was unnecessary.

### D. The Standard for Critical Circumstances Determinations Provided for in the U.S. Statute Is Consistent with Articles 10.6 and 10.7 of the Anti-dumping Agreement

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[396] *See New Zealand - Imports of Electrical Transformers from Finland*, L/5814, Report of the Panel, adopted on 18 July 1985, 32/S55, 66-67, at paras. 4.2-4.3 (after concluding that the agreement was silent because it did not provide any specific guidelines for the calculation of the cost of production in an anti-dumping case, the panel stated that "the method used in this particular case appeared to be a reasonable one," and it therefore found no violation of the Agreement.).

[397] *Critical Circumstances Policy Bulletin*, 63 Fed. Reg. at 55364 **(Exh. JP-3)**.

282. Section 733(e) of the Act provides for the Department, upon receiving an allegation of critical circumstances, to make the required determinations outlined in Article 10.6 of the Anti-dumping Agreement at any time after the initiation of an investigation based upon "the information available to it at that time." Japan claims that Section 733(e) is inconsistent with Articles 10.6 and 10.7 of the Agreement in two respects. First, Japan contends that Section 733(e) is deficient because it does not specifically require that all of the standards of Article 10.7 be satisfied at the time of a preliminary determination of critical circumstances. In particular, Japan claims that the U.S. statute does not expressly require findings that the injury was caused by massive dumped imports or that the massive imports were likely to seriously undermine the remedial effect of the duty. Second, Japan argues that the evidentiary standard for a preliminary critical circumstances determination under Section 733(e) of the Act is lower than that in Article 10.7.

283. These claims are completely without merit. A law is not, on its face, inconsistent with a WTO Agreement unless it mandates actions that are inconsistent with that Agreement. In *United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco*[398] the Panel found that a law did not mandate GATT-inconsistent action where the language of that law was susceptible of a range of meanings, including ones permitting GATT-consistent action. Indeed, a law that does not mandate WTO-inconsistent action is not, on its face, WTO-inconsistent, even if, as is not the case here, actions taken under that law are WTO-inconsistent. For example, the panel in *EEC -- Regulation on Imports of Parts and Components*[399] found that "the mere existence" of the anti-circumvention provision of the EC's antidumping legislation was not inconsistent with the EC's GATT obligations, even though the EC had taken GATT-inconsistent measures under that provision.[400] The Panel based its finding on its conclusion that the anti-circumvention provision "does not mandate the imposition of duties or other measures by the EEC Commission and Council; it merely authorizes the Commission and the Council to take certain actions."[401]

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[398] Panel Report on *United States -- Measures Affecting the Importation, Internal Sale and Use of Tobacco*, adopted 4 October 1994, BISD 41S/131 ("*U.S. -- Tobacco*").

[399] Panel Report on *EEC -- Regulation on Imports of Parts and Components,* adopted 16 May 1990, BISD 37S/132 ("*EEC -- Parts*").

[400] *Id.*, paras. 5.9, 5.21, 5.25-5.26.

[401] *Id.*, para. 5.25.

284. Plainly, where, as here, the U.S. critical circumstances provision itself does not mandate an action inconsistent with the Anti-Dumping Agreement, Japan's claim must fail. That it does not mandate inconsistent actions is demonstrated by the fact that, in applying this provision, the Department specifically makes the findings required by the Anti-Dumping Agreement.

### 1. As Part of Its Policy and Practice Under the U.S. Statute, the Department Makes All of the Findings Required Under Article 10.6 of the Agreement

285. Japan argues that Section 733(e) of the Act is facially inconsistent with Article 10.6 of the Agreement because the U.S. statute does not mandate a *separate* finding that the injury was caused by massive dumped imports. However, the absence of such a requirement from the statute does not mean that this factor is not considered and analyzed as part of the Department's critical circumstances determination. As a result of its complete analysis in cases like this, the Department does, in fact, determine whether the massive imports are both dumped and causing injury (or threat thereof) to the domestic industry. As part of the Department's inquiry regarding knowledge of dumping, the Department considers the dumping margins for the largest producers of the subject merchandise. The Department will find importer knowledge of dumping where the producer has a dumping margin of greater than 25 percent. Second, the Department makes a finding as to whether importers have knowledge, or should have knowledge, that the dumping is causing injury (or threat thereof) to the domestic industry. After determining that the importers have both knowledge of dumping and injury, the Department then reviews the shipment data for each respondent (or U.S. Census Bureau and Customs Service import statistics, where shipment data are not on the record) in order to determine whether there exists "massive imports." If there is an increase in imports of more than 15 percent during the relevant time period, the Department will find that the imports are "massive."[402] Japan argues that the Department, at this point, must also find that those imports are dumped and are causing injury to the domestic industry. However, these separate findings are not necessary. Indeed, the Department has already made such conclusions. First, it has already been determined that the anti-dumping margins on these imports are above 25 percent. Thus, they are dumped. Second, the Department does not make a critical circumstances determination without considering the injury (or threat thereof) to the domestic industry.

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[402] *See* 19 C.F.R. § 351.206(h)(2). When determining whether massive imports exist, the Department examines: (1) the volume and value of the imports; (2) seasonal trends; and (3) the share of the domestic consumption accounted for by the imports. *See id.* at § 351.206(h)(1).

286. Second, it is evident from the record and the Department's analysis that the surge of massive dumped imports was causing injury or threat thereof. The Department made a specific finding that importers had knowledge that the dumping would cause injury or threat thereof. This decision was based on the extent of the increase in the volume of imports of the subject merchandise during the critical circumstance period, the magnitude of the dumping margins, the evidence in the petition demonstrating injury to the U.S. industry, numerous press reports discussing the intense hardship caused by the flood of imports (specifically discussing rising imports and falling domestic prices) - and importantly - on the USITC's preliminary finding that the domestic industry was already threatened with injury. The massive surge of dumped imports (including a 100% increase in imports over a short time) could only compound the impact of the dumping on the domestic industry. As explained above, the term injury in Article 10.6(ii) includes "threat of material injury." Thus, because the U.S. industry was already threatened with injury, the tremendous surge of dumped imports could have only further threatened, or actually caused, injury. The U.S. statute did not require a separate injury finding in this respect. However, it does not preclude such analysis, and the Department practice leads to a consistent application of Article 10.6(ii). Furthermore, the Agreement does not specify how the administering authority is to determine that "the injury is caused by massive dumped imports." Because the Department's implementation is reasonable based upon the language of the Agreement, it is consistent with the Agreement.

287. Japan further argues that the U.S. statute is inconsistent with Article 10.6 because it does not mandate a separate finding that the massive imports are "likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied." However, as discussed previously, the statutory framework (including the relevant regulation and the policy bulletin applicable to preliminary critical circumstances determinations) does compel this finding.[403] As such, Section 773(e) of the Act is consistent with the Agreement on this basis as well.[404]

### 2. The Evidentiary Standard for Preliminary Critical Circumstances Determinations Is Not Lower in the U.S. Statute than in Article 10.7 of the Agreement

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[403] *See* 19 C.F.R. § 351.206(h) and (i); *Critical Circumstances Policy Bulletin*, 63 Fed. Reg. at 55364 **(Exh. JP-3)**.

[404] *See Section 301 Panel Report*, at para. 7.27.

288. Section 733(e) of the Act provides for the Department to make a preliminary critical circumstances determination where there is "a reasonable basis to believe or suspect" that the necessary conditions for such relief have been met. Japan argues that this evidentiary standard is a "much lower threshold" than the "sufficient evidence" standard set forth in Article 10.7 of the Agreement. However, Japan provides no legal basis for this conclusion, and it is simply incorrect. Indeed, the "reasonable basis to believe or suspect" standard set forth in Section 733(e) of the Act is fully consistent with the "sufficient evidence" standard detailed in Article 10.7.

289. As demonstrated by the discussion above, even where a statutory provision does not contain the precise words of a WTO agreement, this does not mean that it does not impose the same requirements or standards, or permit the administering authority to take action consistent with the agreement.

290. Indeed, a review of previous Department of Commerce critical circumstances determinations shows that the "reasonable basis to believe or suspect" standard is similar or even identical to the "sufficient evidence" standard found in Article 10.7 of the Anti-dumping Agreement. For example, in *Certain Polyester Staple Fiber From the Republic of Korea,* the Department explained as follows:

> Section 733(e)(1) of the Act provides that if a petitioner alleges critical circumstances, the Department will determine whether there is *a reasonable basis to believe or suspect that*: (A)(i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise . . . . Based on the recent existence of this order, there is *sufficient evidence* to determine that there is a history of dumping of the subject merchandise and a history of material injury as a result thereof. (Emphasis added).[405]

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[405] 64 Fed. Reg. 60776, 60779 (Nov. 8, 1999) (preliminary determination of critical circumstances) (emphasis added)(**Exh. US/B-46**); *see also Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation*, 64 Fed. Reg. 60422, 60423 (Nov. 5, 1999) (preliminary determination of critical circumstances) ("Section 733(e) of the Act provides that the Department will determine that critical circumstances exist if there is *a reasonable basis to believe or suspect that*: (A)(i) there is a history of dumping . . . The existence of an antidumping order on ammonium nitrate in the EC is *sufficient evidence* of history of injurious dumping.") (emphasis added) (**Exh. US/B-47**).

The Department's use of the "reasonable basis to believe or suspect" and "sufficient evidence" standards interchangeably in its decisions reflects that the two standards are not intended to be and, in fact, are not different. Accordingly, the evidentiary standard provided for in Section 733(e) of the Act is not inconsistent with that in Article 10.7 of the Anti-dumping Agreement, and Japan's argument to the contrary should be rejected.

## PART C: INJURY

## I. Introduction

1. Japan raises claims concerning two United States actions with regard to material injury under the Anti-Dumping Agreement. It attacks a clause of the U.S. anti-dumping statute and challenges the adequacy of the findings of some Commissioners at the United States International Trade Commission ("USITC") supporting the affirmative determination in the USITC's investigation of *Certain Hot Rolled Steel Products from Japan*.[1]

2. Japan's arguments concerning both of these claims substantially mischaracterize the United States' measures. As a result, much of the discussion that follows will be devoted to correcting Japan's misstatements about the U.S. statute and the USITC determination. Since Japan misstates the facts, almost all of its arguments are irrelevant to the United States' measures. Consequently, Japan cannot be said to have met the burden of proof in this proceeding. Nevertheless, the United States demonstrates below why its statute and the USITC's decision are in accordance with the Anti-Dumping Agreement.

3. This section of the United States' first submission will address two issues: first, the so-called captive production provision of the United States anti-dumping statute and, then, the USITC's determination, including the application of the captive production provision in this case. As Japan's analysis demonstrates,[2] this panel's decision as to the statutory provision's consistency with the Anti-Dumping Agreement should not impact on the adequacy of the determination. As Japan notes, a plurality of affirmative votes by three of the six Commissioners constitutes an affirmative determination by the USITC under U.S. law. In this investigation, three Commissioners did not find the provision applicable but nevertheless made affirmative determinations. The votes of those three USITC Commissioners are sufficient to form the basis for an affirmative determination under U.S. law.

## II. The Captive Production Provision Is Consistent with the Anti-Dumping Agreement

4. The "captive production provision" of the U.S. statute, section 771(7)(C)(iv) of the Tariff Act of 1930, as amended ("the Act"),[3] becomes relevant to an injury determination when vertically-integrated U.S. producers sell a significant volume of their production of the domestic like product to U.S. consumers (*i.e.*, the merchant market) and internally transfer a significant volume of their production of that same like product for further processing into a distinct

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[1] Inv. No. 731-TA-807 (Final), USITC Pub. No. 3202 (June 1999) ("USITC Views") (**Exh. US/C-1**).

[2] First Submission of Japan at para. 44.

[3] 19 U.S.C. § 1677(7)(C)(iv) (**Exh. Jp-4(e)**).

downstream article (*i.e.,* captive production). Under certain conditions,[4] then, the statute directs the USITC to focus primarily -- not exclusively -- on the merchant market in performing its analysis.[5]

5. In enacting this provision, the United States Congress ("Congress") recognized that, in certain situations, dumped imports compete primarily with the domestic like product in the merchant market, not with the inventory internally transferred for processing into a separate downstream article.[6] Since the main effects, if any, of imports would likely be felt in the merchant market, it is logical that this should be a focus of the injury analysis. If the investigation revealed that imports were having no significant effect even on the merchant market, then it would be highly unlikely that imports would not be having an impact on the industry as a whole. Thus, Congress sought to provide for a more focused analysis which allowed the USITC to obtain a more complete picture of the competitive impact of imports on the domestic industry.[7]

6. What Congress did *not* do, despite the Japanese contention to the contrary,[8] was create a

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[4] The provision provides for a multi-step analysis. As a threshold matter, the USITC must first determine that a significant amount of the like product is both internally transferred by the domestic industry for production of a downstream article and sold on the merchant market. If this threshold criterion is satisfied, then three other questions must be answered in the affirmative: (1) whether the "domestic like product produced that is internally transferred for processing into that downstream article does not enter the merchant market for the domestic like product;" (2) whether the "domestic like product is the predominant material input in the production of that downstream article;" and (3) whether "the production of the domestic like product sold in the merchant market is not generally used in the production of that downstream article." § 771(7)(C)(iv) of the Act, 19 U.S.C. § 1677(7)(C)(iv). There is no argument over whether the statutory criteria delineated by the statute are appropriate or whether the three Commissioners that applied the provision reasonably found that the statutory criteria were satisfied.

[5] The statute directs the USITC to "focus primarily on the merchant market for the domestic like product" when assessing the market share and financial performance of the domestic industry. § 771(7)(C)(iv) of the Act, 19 U.S.C. § 1677(7)(C)(iv).

[6] Statement of Administrative Action ("SAA"), H.R. Doc. No. 103-316, vol. I at 852 (1994) (**Exh. US/C-2**). The SAA is "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Agreements, . . . {and} it is the expectation of Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement." Thus, the Statement of Administrative Action has been affirmatively approved by Congress.

[7] SAA at 852.

[8] First Written Submission of the Government of Japan in *United States - Anti-dumping Measures on Certain*
(continued...)

provision requiring the USITC to focus on the merchant market and ignore the captive market or focus on one segment of production to the exclusion of the industry as a whole. In fact, Congress expressly rejected this interpretation of the captive production provision when it approved the Statement of Administrative Action, which said, "{t}he provision does not require the USITC to focus exclusively on the merchant market."[9] The statute does require the USITC in all cases to render a determination of whether there is material injury to the domestic industry as a whole.

7. Congress' express intent was to make the captive production provision consistent with the Anti-Dumping Agreement.[10] As will be demonstrated below, it achieved this goal. Indeed, it is Japan's position in this case that would tend to create violations of the Anti-Dumping Agreement, since Japan's position would require investigating authorities to ignore factors that the Agreement makes relevant. Japan would require the investigating authorities to pretend that a single market for hot rolled steel exists, and thus ignore the distinction between sales to the merchant market and captive production.

8. Since it has based its arguments on a transparent misreading of the United States statute, Japan obfuscates the issues involved by making sweeping allegations about dangerous levels of protectionism or anti-competitive behavior,[11] questioning the continued validity of the anti-dumping regime[12] and imputing improper motives to the United States. These insinuations have no place in a proceeding before the Dispute Settlement Body. The issue with which this Panel is presented is whether the United States' *actions* or *law* violate the terms of the Anti-Dumping Agreement. A panel is called upon to provide "security and predictability in the multilateral trading system" and should not "diminish the rights and obligations provided in the covered agreements."[13] Japan is seeking to have this Panel go beyond the issue at hand and render policy determinations that are beyond its jurisdiction. The Panel should reject such an attempt in no uncertain terms.

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[8] (...continued)
*Hot Rolled Steel Products from Japan* ("First Submission of Japan") at para. 218.

[9] SAA at 852.

[10] SAA at 852.

[11] First Submission of Japan at paras. 44-45.

[12] First Submission of Japan at para. 43.

[13] Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") at para. 3.2.

### A. U.S. Law Requires the U.S. Authority to Examine the Effects of Imports on the Domestic Industry as a Whole, Consistent With Articles 3 and 4 of the Anti-Dumping Agreement

9. Japan's argument against the captive production provision rests on the misconception that the provision requires the USITC to ignore the effects of imports on the domestic industry as a whole.[14] Japan is simply wrong. The United States agrees entirely that a determination under Article 3 of the Anti-Dumping Agreement concerning whether a "domestic industry," as defined in Article 4.1, is materially injured requires an examination of "domestic producers as a whole of the domestic like products." An analysis of the effects of imports on the domestic industry that requires a focus on the portion of the output of the domestic like product that competes in the marketplace with dumped imports is entirely consistent with that requirement. It, in effect, is merely a recognition that, under certain conditions, the fact that domestic producers internally transfer a significant portion of the production while selling significant portions in the merchant market constitutes a "relevant economic{}factor having a bearing on the state of the industry" under Article 3.4.

10. U.S. law requires the USITC to determine whether "an industry in the United States" is materially injured or threatened with material injury.[15] It defines "industry" as "the producers as a {w}hole of a domestic like product,... ." Therefore, on the face of the statute, the USITC is not permitted to disregard any portion of the domestic producers' output. The captive production provision's elaboration on the factors that the Commission must consider in making an injury determination does not detract from this expansive definition. Rather, the captive production provision itself, the directions that the United States Congress gave in enacting it, and the other provisions of the United States anti-dumping statute make clear that the USITC must find injury to the producers as a whole.

#### 1. The captive production provision, itself, shows that the USITC must consider the industry as a whole

11. Japan's depiction of the captive production provision is wrong both because of the circumstances in which it applies and the nature of the analysis that the USITC is to perform when it does apply. The captive production provision only applies when domestic producers "internally transfer significant production of the domestic like product . . . *and sell significant*

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[14] *E.g.* First Submission of Japan at para. 218.

[15] 19 U.S.C. § 1673d(1)(A) (**(Exh. Jp-4(c))**.

*production of the domestic like product in the merchant market*."[16] Therefore, the USITC may apply the provision only when merchant market sales represent a significant proportion of the domestic industry's overall production and, consequently, the impact of imports on that segment are liable to have a significant effect on the industry as a whole.

12. The statute does not, however, allow the USITC to assume, simply because a significant portion of domestic production is destined for the merchant market, that impacts on that segment will *ipso facto* constitute material injury to the industry. Rather, if the provision's threshold requirements are satisfied, the USITC focuses "primarily" on the merchant market.[17] As those Commissioners who applied the provision in this case found, the statutory language requires "in all cases that the {USITC} determine material injury with respect to the industry as a whole, including the industry's performance with respect to both merchant market operations and captive production."[18]

13. Japan's contrary interpretation relies on a contorted interpretation of the statutory language. The Japanese Government is arguing that the word "primarily" modifies "focus"[19] to somehow narrow it. "Primarily" in no way connotes exclusivity, but manifestly attempts to incorporate more than one focus into the USITC's calculation. The use of the term "primarily" thus clearly indicates Congress' intent that the USITC's analysis of the factors should encompass more than the merchant market.

14. Congress provided a very clear statement of its intended effect of the captive production provision by approving the Statement of Administrative Action, the authoritative legislative history of the Uruguay Round Agreements Act, in which the captive production provision was enacted. The SAA, explains that the captive production provision, "does not require the USITC to focus exclusively on the merchant market."[20] Consequently, Congress approved of an authoritative expression squarely contradicting Japan's proposed interpretation of the captive production provision. Congress unequivocally directs the USITC to look beyond the merchant market in its evaluation of the factors.

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[16] § 771(7)(C)(iv) of the Act, 19 U.S.C. § 1677(7)(C)(iv).

[17] § 771(7)(C)(iv) of the Act, 19 U.S.C. § 1677(7)(C)(iv).

[18] USITC Views at 35.

[19] Again, the language of the statute directs the USITC to "focus primarily on the merchant market for the domestic like product." § 771(7)(C)(iv) of the Act, 19 U.S.C. § 1677(7)(C)(iv).

[20] SAA at 852.

### 2. The statutory provisions governing injury, taken together, demonstrate that the USITC must consider the industry as a whole, even when the captive production provision applies

15. Looking at the captive production provision in light of the full statutory scheme governing injury determinations, it is clear that Congress had no intention of excluding a portion of the domestic industry's production from the injury analysis. When evaluating the effects of dumped imports, the statute requires the USITC to consider the volume of dumped imports, the price effects of dumped imports on the domestic like product, and the impact of the dumped imports on the domestic producers of the like product.[21] In § 1677(7)(C), the statute delineates specific factors bearing on each of these issues.[22] The captive production provision does nothing to alter these fundamental requirements of the statute.

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[21] 19 U.S.C. § 1677(7)(B).

[22] Section 1677(7)(C) discusses the "evaluation of relevant factors" and provides as follows:

For purposes of subparagraph (B) -

(i) Volume

In evaluating the volume of imports of merchandise, the Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.

(ii) Price

In evaluating the effect of imports of such merchandise on prices, the Commission shall consider whether -

(I) there has been significant price underselling by the imported merchandise as comparedth the price of domestic like products of the United States, and

(II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

(iii) Impact on affected domestic industry

In examining the impact required to be considered under subparagraph (B)(i)(III), the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to -

(I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,

(II) factors affecting domestic prices,

(III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,

(IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and

(V) in a proceeding under part II of this subtitle, the magnitude of the margin of dumping.

16. The captive production provision, on its face, only affects some statutory factors dictated in clause (iii) of section 1677(7)(C) and does not affect other clauses of the statute. When the provision, appearing in subsection (iv) of 19 U.S.C. § 1677(7)(C), applies, "the Commission, in determining market share and the factors affecting financial performance set forth in clause (iii) {of 19 U.S.C. § 1677(7)(C)},[23] shall focus primarily on the merchant market for the domestic like product."

17. As a result of this narrow application dictated in the statute, the USITC must perform an initial layer of analysis for these market share and financial performance that it is not otherwise required to do for any other factor. For these factors, the USITC examines both the merchant market and the total industry. That the USITC must consider the impact of imports on the total industry in addition to the merchant market is reenforced by the fact that the authority is required to "evaluate *all* relevant economic factors described in {19 U.S.C. § 1677(7)(C)} within the context of the business cycle and conditions of competition that are distinctive to the affected industry."[24] The factors addressed by the captive production provision are not excluded from this overall directive.

18. Moreover, the factors that the USITC is to consider under subsection (iii) are not exclusive. The chapeau of that subsection states that "the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry in the United States." The statute is explicit that such relevant economic factors are "including, but not limited to" the enumerated factors that follow. Thus, the USITC must, under U.S. law, evaluate all relevant economic factors having a bearing on the state of the industry.

19. Similarly, because the captive production provision on its face only affects the analysis of certain factors enumerated in subsection (iii) pertaining to impact, it does not require a change in the USITC's analysis of the significance of volumes of imports under subsection (i) of 19 U.S.C. § 1677(7)(C). That subsection provides, "In evaluating the volume of imports of merchandise, the USITC shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant." Although the USITC takes into account the fact of the merchant market in its analysis of the significance of imports, it nevertheless under subsection (i) considers them relative to production or consumption in the United States, not only relative to production or

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[23] This subsection is titled "impact on affected domestic industry."

[24] 19 U.S.C. § 1677(7)(C) (emphasis added).

consumption for the merchant market.[25]

20. In brief, Japan's argument concerning the operation of the captive production provision is contrary to the plain language of the statute, to the United States Congress' expressed intention in enacting it, and to the USITC's interpretation of it. Seeking to find support for its position, Japan resorts to purely aspirational statements by lobbyists before the provision was passed. Such statements are not, however, a source for the interpretation of statutes under U.S. law.[26]

21. The statements do not, in any event, support Japan's position. If anything, they show that lobbyists failed to persuade the United States Congress to enact the provision that they desired. Japan cites the efforts of the Committee to Support U.S. Trade Laws to influence Congress to enact a "captive production provision prohibiting USITC from considering captive production in its injury and causation analysis."[27] The definitive statement by Congress cited above shows that it was not persuaded by these efforts because it stated the exact opposite. Whereas the steel industry purportedly lobbied for the consideration of the merchant market exclusively, Congress, in no uncertain terms, expressed that the merchant market was not to be considered exclusively. The lobbying efforts Japan cites demonstrate that Congress explicitly rejected the construction of the captive production provision that Japan now proffers.

## B. The Captive Production Provision Meets the Requirement to Consider Relevant Economic Factors in Keeping with Article 3 of the Anti-Dumping Agreement

### 1. The refined analysis provided for in the captive production provision helps assure an objective examination of all relevant factors, as required by Articles 3.1 and 3.4

22. The captive production provision is entirely in accord with the specific obligations of

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[25] The requirements of Article 3.1(a), to analyze effects of imports on prices, and of the second sentence of Article 3.2, to examine price undercutting, depression and suppression, would appear to assume the existence of sales in a marketplace. Thus, where a substantial proportion of output is not sold, the provisions of the Agreement concerning price effects contemplate an analysis of effects on only part of production.

[26] In interpreting a statute, it is well established that, first, the text of the statue is examined, and, if the statutory language is unclear, then the legislative history of the statue is examined. *See Blum v. Stenson*, 465 U.S. 886, 896 (1984) (**Exh. US/C-4**). Efforts of lobbyists are not listed among the traditional sources of legislative history. *See* 3 *Sutherland Statutory Construction* 371 (5th Ed.1992) (**Exh. US/C-5**).

[27] First Submission of Japan at para. 219.

Article 3 of the Anti-Dumping Agreement. As has been demonstrated, the provision does not alter 19 U.S.C. § 1677(7)(C)(i), which tracks the language of the first sentence of Article 3.2 concerning the volume of dumped imports. Likewise, although the captive production provision does impose additional fact-finding duties on the USITC in making determinations on the impact of dumped imports on the affected industry under 19 U.S.C. § 1677(7)(C)(iii), it does not affect that subsection's requirement, like that of Article 3.4, to consider "all relevant economic factors." Because the captive production provision does not prohibit the USITC from considering any evidence or from giving such weight to that evidence as it may ultimately deem appropriate, it is also consistent with the requirement of Article 3.1 to conduct an "objective examination" of the volume, price effects and consequent impact of imports.

23. Indeed, the captive production provision represents an analytical tool that assures the consideration of all relevant factors, unlike the alternative on which Japan insists. Congress recognized a relevant economic factor bearing on certain industries that internally transfer a significant amount of their production of the domestic like product. When an industry engages in significant captive consumption, a substantial amount of the domestic industry's production is shielded from competition with the dumped imports. However, if a significant part of its production is destined for the merchant market as well, the impact of imports in the merchant market, alone, may have an impact on the overall state of the industry. Thus, examining only aggregate information for the industry as a whole would risk obscuring any effects that this segment may have.

24. Congress thus reasonably decided that the USITC should specifically examine the impact of dumped imports on the segment of the industry where domestic producers compete directly with those imports and assess how that competition is effecting the industry as a whole. The captive production provision ensures that the USITC takes into account a relevant economic indicator -- competition between the domestic like product and dumped imports -- when assessing the impact of dumped imports on the domestic industry. Nothing in the examination required by Congress prohibits the USITC from concluding that, notwithstanding observed effects in the merchant market segment, imports are not materially injuring a domestic industry as a whole.

25. Japan's position, however, would require an investigating authority to disregard the significance that impacts specific to a merchant market sector might have for the industry as a whole. Japan asserts that it is inappropriate to isolate the merchant market sales *as either the primary or secondary focus of analysis*.[28] Japan offers no basis for this amazing assertion. Article 3.4 can provide no support for it. That Article requires investigating authorities to

[28] First Submission of Japan at para. 245.

evaluate all relevant economic factors. It does not limit the methods by which they may choose to do so nor does it provide any exceptions that would justify ignoring such factors. As will be discussed below, WTO precedent supports the use of sectoral analysis when accompanied by an analysis of the industry as a whole.

26. Indeed, the non-objective nature of Japan's position is illustrated by the fact that Japan itself urges such a similar analysis when it contrasts the performance of minimills against that of the integrated steel producers.[29] Whereas the captive production provision calls for a segmented analysis depending on the destination of merchandise, Japan argues for a segmented analysis based on the type of producer. It provides no basis for why the one kind of analysis should be prohibited while it urges that the other kind of analysis is required.

27. Moreover, even in discussing the captive production provision itself, Japan relies on irreconcilable positions. Initially, Japan argues that the USITC improperly segments markets in its analysis, thereby not resting its determination on the industry "as a whole."[30] Later, however, it cites with approval what it characterizes as the USITC's past practice of distinguishing market segments when there are internal transfers of the domestic like product.[31] Thus, Japan's arguments concerning segmented analysis are plainly influenced by the results that it desires. It urges an analysis that is plainly contrary to the "objective examination" requirement of Article 3.1.

### 2. The captive production provision pinpoints evidence relevant to each factor as required by Articles 3.4, 3.5 and 3.6 of the Anti-Dumping Agreement

28. Article 3.4 specifies illustrative relevant economic factors that that an authority should consider. That list of relevant economic factors distinguishes between effects on "sales", the first item enumerated, and effects on "output", the third item enumerated. Article 3.4 thus recognizes that imports may have effects on sales that they do not have on output. Unlike Japan's position, the captive production provision fully takes into account the differences between these two factors.

29. Cases meeting the threshold conditions for applying the captive production provision may

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[29] First Submission of Japan at paras. 35-36.

[30] First Submission of Japan at para. 222, 225; *see also* para. 246.

[31] First Submission of Japan at paras. 248-249.

present facts in which the distinction that Article 3.4 draws between effects on sales and on output are particularly pertinent. Internal transfers of product for captive consumption typically cannot properly be called sales even though the United States recognizes such production as output. If they are priced at all, they are often assigned price values for accounting purposes only. In such cases, the effects of imports on sales may well be observable only in the merchant market. Japan's position, however, would require an authority in such a case not to examine effects on sales.

30. Thus, Japan's argument that an injury determination may not focus either primarily or secondarily on the merchant market is contrary to the requirement of Article 3.4 to examine the effects of imports on sales in all cases, including when there is substantial captive consumption. As a result, Japan would systematically, in such cases, give effects on output dispositive weight over effects on sales. Nothing in the Agreement, however, supports giving effects on output such a priority over effects on sales. Indeed, although the United States does not claim that the order in which factors are listed indicates the weight that they are to be accorded in any given case, it is noteworthy that Article 3.4 lists effects on sales before effects on output.

31. As has been demonstrated, the United States statute does not limit the USITC's analysis of market share only to merchant market sales. Rather, it requires the USITC to examine market share primarily in terms of share of the merchant market. The USITC proceeds, as it did in the current case, also to examine market share in terms of share of total consumption. Such an analysis is plainly within the discretion provided by Article 3.4.

32. Japan's contention that the captive production provision "ignores the attenuated nature of import competition in the captive market"[32] is simply ill founded. The provision does not, as Japan alleges, require the USITC to ignore the possibility that, due to the sheltered nature of captive production, apparent effects on the merchant market do not cause material injury to the industry as a whole. The USITC must still make a determination concerning the industry as a whole.

33. Rather, the captive production provision constitutes a command to the USITC not to ignore evidence of injury resulting from impacts specific to the merchant market. Thus, the captive production provision is entirely consistent not only with Article 3.4, but also with Article 3.5's requirement that all relevant evidence before the authority be examined. Instead, it is Japan's view that effects specific to the merchant market may not be either a primary or secondary focus of examination that would violate Article 3.5.

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[32] First Submission of Japan at para. 226.

34. Similarly ill founded are Japan's arguments based on Article 3.6. As Japan notes,[33] this provision requires that an administering authority assess "the effect of dumped imports in relation to the domestic production of the like product." The United States statute so provides,[34] and the captive production subsection does not furnish an exception to that requirement. Japan seeks to move from that uncontroversial proposition to the proposition that effects on output must be given weight over effects on sales. Article 3.6, like Article 3.4, refutes this proposition. Article 3.6 provides for assessing import effects in terms of production "when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits." Thus, under Article 3.6, sales are no less important than the production process in the identification of production.

35. In sum, Japan's challenge to the captive production provision is based on a thoroughgoing misreading of both the U.S. statute and Articles 3 and 4 of the Anti-Dumping Agreement. WTO precedent also refutes Japan's arguments.

### C. WTO Precedent Recognizes a Segmented Market Analysis as Consistent with Article 3 and Article 4

36. The reasoning of the panel in *Mexico -- High Fructose Corn Syrup ("HFCS")*[35] provides direct support for the kind of segmented market analysis[36] delineated in the captive production provision. That panel properly distinguished between a market segmented analysis and a determination based only on information about one market sector, to the exclusion of the

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[33] First Submission of Japan at para. 240.

[34] *See* 19 U.S.C. § 1677(4)(D)("The effect of dumped imports ... shall be assessed in relation to the United States production of a domestic like product if available data permit the separate identification of production in terms of such criteria as the production process or the producer's profits.")

[35] Panel Report, *Mexico -- Anti-dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, 28 January 2000.

[36] As noted above, one of the captive production provision's threshold requirements is designed to assure that merchant market sales represent a significant factor for the domestic industry as a whole. The other preconditions are that "the production of the domestic like product sold in the merchant market is not generally used in the production of that downstream article" and that "the domestic like product produced that is internally transferred for processing into that downstream article does not enter the merchant market for the domestic like product." All three of these criteria help define captive production and merchant market sales as discrete segments.

remainder of the domestic industry's production.[37] While it found that an analysis limited exclusively to one market sector generally would not be sufficient for establishing injury,[38] it noted that nothing in the Anti-Dumping Agreement precluded the use of segmented analysis where different sectors are analyzed separately.[39] The panel found that an analysis focusing on the sector where dumped imports and the domestic industry directly compete is permitted, although it does not "excuse the investigating authority from making the determination required by the Agreement -- whether dumped imports injure or threaten injury to the domestic industry as a whole."[40]

37. In fact, the *HFCS* panel even went so far as to advocate for the use of a sectoral analysis in certain circumstances. It found that an analysis by sector could provide a "better understanding of the actual functioning of the domestic industry and its specific markets and thus of the impact of imports on the industry."[41] Moreover, "in many cases, such an analysis can yield a better understanding of the effects of imports, and a more thoroughly reasoned analysis and conclusion."[42]

38. The flaw that the *HFCS* panel found with the Mexican government's consideration of a single segment does not exist in the U.S. statute. The panel found that the Mexican government "deliberately excluded from its analysis" a portion of the domestic production,[43] thereby ignoring "possible effects of imports on the portion of the domestic industry's production" in the excluded sector of the market, and "ignored the effect of {that} sector on the condition of the domestic producers."[44] In contrast, the captive production provision only requires the USITC to focus primarily -- not exclusively -- on the merchant market segment in considering certain factors, and

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[37] *HFCS* at para. 7.154.

[38] An analysis of a specific sector could be sufficient if this sector was adequately representative of the industry as a whole. *HFCS* at para. 7.155.

[39] *HFCS* at para. 7.154.

[40] *HFCS* at para. 7.160.

[41] *HFCS* at para. 7.154.

[42] *HFCS* at para. 7.154.

[43] *HFCS* at para. 7.159.

[44] *HFCS* at para. 7.160.

the statute requires the USITC to make a determination about the industry as a whole. When the USITC focuses primarily on the merchant market it is performing an analysis akin to the consideration of factors found acceptable in *HFCS;*[45] it is not making it the basis for the ultimate determination of injury.

### D. The Injury Analyses of Other Authorities Faced with Similar Facts Demonstrate the Reasonableness of the United States' Approach

#### 1. Canada

39. Faced with circumstances similar to those for which the United States' captive production subsection provides, the Canadian Import Trade Tribunal ("CITT") has adopted a similar approach. Its decisions demonstrate how an analysis that focuses on captive production does not, as Japan claims, dictate results.[46]

40. In *Tomato Paste in Containers Larger than 100 Fluid Ounces, Originating in or Exported from the United States of America*,[47] the CITT, like the United States statute, rejected the proposition that captively consumed tomato paste should not be regarded as production of the domestic tomato paste industry. Although the CITT found that dumped import prices were too low in 1992 for domestic producers to compete on a profitable basis, it did not find the industry materially injured by imports. Rather, it found the lost sale margin on merchant-market sales for one firm "small when compared to the gross margin achieved on products that Heinz produces from tomato paste." As to the other producer, it found that its high level of capacity utilization due primarily to captive production was the main reason for its decline in production for merchant market sales.

41. The CITT engaged in a similar analysis but reached the opposite result in *Certain Cold Rolled Steel Sheet Originating In or Exported from the Federal Republic of Germany, France, Italy, the United Kingdom and the United States of America*.[48] There, the CITT calculated total

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[45] *HFCS* at 7.154.

[46] *See Vienna Convention on the Law of Treaties*, Article 31.3 (b) (taking into account any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.)

[47] *Tomato Paste in Containers Larger than 100 Fluid Ounces, Originating in or Exported from the United States of America,* CITT Inquiry No. NQ-92-006, at 16 (March 30 1993) ("*Tomato Paste*) (**Exh. US/C-6**).

[48] *Certain Cold Rolled Steel Sheet Originating In or Exported from the Federal Republic of Germany, France,*
(continued...)

production, as well as performing a separate calculation for production for internal consumption and for the merchant market. Also, the CITT calculated employment, capacity, capacity utilization, financial expenses, depreciation and net income for all production. It further calculated import and domestic shares of market sales, net sales and costs of good sold. Thus, the CITT made findings based on data for both the industry as a whole and for data focusing on merchant market sales. Its determination of material injury was based on finding that the industry's difficulty adjusting to increasing volumes of low-priced dumped import prices was the direct cause of a shift from overall industry profitability to overall losses.[49]

42. Although these cases preceded the current version of the Anti-Dumping Agreement, the CITT's practice has continued since the Agreement. For example, in *Certain Flat HotRolled Carbon and Alloy Steel Sheet Products Originating In or Exported From France, Romania, The Russian Federation and the Slovak Republic*, CITT Inquiry No. NQ-98-004 (July 19, 1999), the CITT again focused on the effects of imports on the merchant market. It addressed, and rejected as factually unsupported, arguments similar to those that had been successful in *Tomato Paste*. Specifically, the CITT responded to arguments that domestic producers were preferring to allocate production to more profitable downstream products. The CITT, however, found that they did so because prices in the merchant market had been forced down by low-priced imports.[50] The CITT found that the industry at the end of the investigative period needed to discount sales to the merchant market to maintain overall capacity utilization and found material injury based on the fact that price erosion caused primarily by dumped imports accounted for a significant part of the domestic industry's financial losses.[51]

43. Thus, in all such cases, the CITT examined evidence concerning whether the impact of imports on the merchant market segment had a materially injurious effect on the industry as a whole. The CITT's approach appears to differ somewhat from that required by the United States

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[48] (...continued)
*Italy, the United Kingdom and the United States of America*, CITT Inquiry No. NQ-92-009, at 15-16, 19 (July 29, 1993) (**Exh. US/C-7**).

[49] *Id.*

[50] *Certain Flat Hot Rolled Carbon and Alloy Steel Sheet Products Originating In or Exported From France, Romania, The Russian Federation and the Slovak Republic*, CITT Inquiry No. NQ-98-004 at 29, 30 (July 19, 1999) (**Exh. US/C-8**).

[51] *Id.*

statute,[52] and in citing these cases the United States does not necessarily endorse their outcome on the facts. Nevertheless, the CITT's approach confirms the reasonableness of the requirement to focus in appropriate cases on the effects of imports on merchant market sales. Such practice by other countries supports the conclusion that the United States' provision is a permissible approach under the Anti-Dumping Agreement.

### 2. The European Communities

44. The arguments that Japan directs at the United States' captive production provision, in fact, appear to confuse it with the different approach that the European Communities have taken in the face of the same circumstances. The EC, like the United States, has recognized the difficulties that captive production pose to an injury analysis. The EC, however, unlike Canada and the United States, excludes output for captive production from its injury analysis in such circumstances.

45. In such cases as *Anti-Dumping Duties on Imports of Certain Flat Rolled Products of Iron or Non-Alloy Steel*, EC Decision No. 283/2000/ECSC (4 February 2000)[53] and *Countervailing Duties on Imports of Certain Flat Rolled Products of Iron or Non-Alloy Steel*, EC Decision No. 284/2000/ECSC (4 February 2000),[54] the EC has excluded all captive production from the production of the industry under consideration. It did so, not on the basis that the product produced for captive production was different from the product produced for merchant-market production, but, rather, on finding that (1) no prices for transfers in the captive market were comparable to those in the free market (a.k.a. merchant market), (2) movement of hot rolled coils between the two markets are insignificant, and (3) integrated EC producers did not purchase product for the captive market from independent parties.[55]

46. Having made these determinations, the EC evaluated the impact of imports on the EC industry only insofar as it produces the like product for merchant market sales. As it stated, it examined "the situation of the Community industry in terms of the development of the various economic indicators such as production, sales, market share and profitability ... with respect to

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[52] The United States' statutory criteria are stricter than the CITT practice. Faced with facts such as those in the *Tomato Paste* investigation, the USITC might have found under the U.S. statute that the amount of captive production was insignificant and thus that a segmented analysis was not required.

[53] **Exh. US/C-9.**

[54] **Exh. US/C-10.**

[55] EC Dec. No. 283/2000/ECSC, at para. 43.

the free market."[56] It considered developments in the subject firms' captive production only insofar as they might constitute another factor causing injury to the industry consisting of production for free market sales. Production capacity could be used for either free market or captive market production, so the EC examined whether the decrease in production intended for the free market was due to an increased need for captive production.[57] This EC analysis is quite different from the analysis that the USITC performs under the U.S. statute because the USITC examines whether the effects of imports on production for the merchant market impact the industry as a whole, including its operations for captive production.

47. The United States expresses no view as to the consistency of the EC's approach with the Anti-Dumping Agreement. The EC decisions are not the subject of this panel proceeding. The EC decisions, like the United States statute, reflect that captive production creates anomalies for the injury factors set forth in Article 3 of the Anti-Dumping Agreement because those factors assume that a like product will be sold in at least potential competition with imports. The United States takes a reasonable approach to addressing such circumstances, recognizing the anomalies that the EC too has recognized, as well as fully and reasonably addressing all of Japan's concerns arising from the Anti-Dumping Agreement.

### E. The Captive Production Provision Is Consistent with Article XVI:4 of the WTO Agreement

48. As discussed above, Congress specifically undertook to make the captive production provision consistent with U.S. international obligations.[58] It rejected proposals that would have raised many of the questions that Japan has raised here and adopted a requirement that fully satisfies the requirements of Articles 3 and 4 of the Anti-Dumping Agreement. Since U.S. laws are in conformity with the Anti-Dumping Agreement, the United States is not in violation of Article XVI:4 of the WTO Agreement.

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[56] EC Dec. No. 283/2000/ECSC, at para. 48.

[57] EC Dec. No. 283/2000/ECSC, at paras. 83-86.

[58] SAA at 852.

## III. The USITC's Material Injury Determination Is Consistent With the Anti-Dumping Agreement

### A. Japan's Submission is Based Upon a Mischaracterization of the USITC's Determination

49. As with other arguments that Japan has raised in this proceeding, Japan accuses the USITC of not conducting an objective examination of the evidence. It does so, however, both by ignoring the nature of the USITC's process and mischaracterizing the USITC's findings. The nature of both the USITC's investigation and its determination in this case demonstrate that those allegations are not true.

#### 1. The nature of the USITC's proceedings

50. The USITC is the United States authority with responsibility for determining, under U.S. anti-dumping law, whether a domestic industry is materially injured, threatened with material injury, or the establishment of an industry is materially retarded, by reason of dumped imports.[59] The USITC is an independent agency, not part of any Executive Branch Department of the U.S. government, that is composed of six commissioners, not more than three of which may be members of the same political party.[60] In order to further ensure the nonpolitical nature of the USITC, in making appointments of commissioners, the members of different political parties must be appointed alternatively,[61] the Chairman and the Vice-Chairman of the USITC must be of different political parties,[62] and it is prohibited to have a Chairman designated who is of the same political party of the preceding Chairman.[63]

51. In determining whether there is material injury to an industry in the United States, threat of material injury to such an industry, or material retardation of the establishment of an industry in the United States by reason of subject imports, an affirmative vote on any of these issues shall

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[59] 19 U.S.C. § 1673d(b)(1).

[60] 19 U.S.C. § 1330(a) (**Exh. US/C-3(a)**).

[61] 19 U.S.C. § 1330(a).

[62] 19 U.S.C. § 1330(c)(3)(B).

[63] 19 U.S.C. § 1330(c)(3)(A).

be treated as a vote that the determination should be affirmative.[64] Three affirmative votes are sufficient under U.S. law to carry an affirmative determination.[65] In the present matter, all six members of the USITC determined that an industry in the United States was materially injured, or threatened with material injury, by reason of imports from Japan of hot rolled steel products that had been found by the Department of Commerce to be sold in the United States at less than fair value.[66] The six Commissioners unanimously voted in the affirmative, with three Commissioners finding that the captive production provision was applicable, and three Commissioners finding that it was not.[67]

52. The USITC instituted the current investigation in September 30, 1998, following receipt of a petition filed by representatives of the domestic hot rolled steel industry.[68] The final phase of the investigation was scheduled by the USITC following notification of a preliminary determination by the Department of Commerce that imports of hot rolled steel products from Japan were being sold at less than fair value. The USITC conducted a public hearing on May 4, 1999, and all persons who requested the opportunity were permitted to appear in person or by counsel.[69]

53. The USITC, consistent with Article 12.2 of the Anti-Dumping Agreement, explains its findings and conclusions in this investigation at length and analyzes the extensive evidence collected. The USITC mailed questionnaires to 31 mills believed to produce hot rolled steel products.[70] Twenty-four firms, representing 95 percent of production of hot rolled steel products

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[64] 19 U.S.C. § 1677(11) (**Exh. Jp-4(g)**).

[65] *Id.*

[66] The views of (then) Chairman Bragg, Commissioner Miller, Commissioner Hillman, and Commissioner Koplan, finding material injury, constitute the majority opinion of the USITC . Commissioner Crawford also found material injury but provided her views separately. Commissioner Askey found that the domestic industry producing hot rolled steel was threatened with material injury by reason of dumped imports.

[67] USITC Views at 9-10.

[68] USITC Views at 1.

[69] *Id.*

[70] USITC Views at III-1.

in the United States, provided the USITC with data on their hot rolled operations.[71] The USITC also sent questionnaires to 77 firms believed to have imported hot rolled steel products, and received usable data from 52 of the firms.[72] Twenty-four producers, which together accounted for approximately 98 percent of U.S. commercial shipments of hot rolled steel products in fiscal year 1998, provided financial data.[73] The petition in this investigation listed six firms believed to produce subject merchandise in Japan, and, accordingly, the USITC requested information from each of the six Japanese producers and exporters through their counsel. Counsel on behalf of the Japanese respondents provided complete data for all six mills, believed to account for approximately 90 percent of Japanese production of hot rolled steel product and about 87 percent of such exports to the United States in 1998.[74] Additional information gathered during the course of this investigation included answers from 63 purchaser questionnaires,[75] official statistics, and other public sources.

54. All parties were provided with opportunities to submit prehearing and posthearing briefs, as well as to appear at a public hearing. Additionally, all sides were permitted to submit final written comments on evidence gathered during the course of the investigation. In June 1999, based upon the extensive record developed in the investigation, the USITC determined that an industry in the United States was materially injured by reason of imports from Japan of hot rolled steel products that had been found by the Department of Commerce to be sold in the United States at less than fair value.[76]

### 2. The USITC's determination

55. The following discussion summarizes some key facets of the USITC determination,

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[71] USITC Views at III-1.

[72] USITC Views at IV-1. Twelve firms reported that they did not import hot rolled steel products during the period for which data were collected and 13 firms did not respond to the USITC's questionnaires. USITC Views at IV-I, n.1.

[73] USITC Views at VI-1.

[74] USITC Views at VII-4. The USITC similarly requested information from the 4 listed Brazilian producers, and 16 firms believed to produce hot rolled carbon steel in Russia. *Id.* at VII-2, VII-4.

[75] USITC Views at II-1.

[76] USITC Views at 3. Commissioner Askey found that the U.S. industry was threatened with material injury by reason of dumped imports. *Id.*

particularly addressing misstatements of fact made in the First Written Submission of Japan. At the outset, the USITC determined that there was one like product consisting of all hot rolled carbon steel products within the scope of the investigation.[77] It also defined the domestic industry as all domestic producers of hot rolled steel.[78]

56. The USITC determined that the hot rolled steel industry in the United States was materially injured by reason of the dumped imports from Japan,[79] which significantly increased in volume over the period of investigation, had price depressing effects on the domestic industry and had a significant adverse impact on the domestic producers of the domestic like product. Consistent with Article 3.1 of the Anti-Dumping Agreement, the determination of material injury due to dumped imports was based upon an objective examination of the positive evidence. The USITC assessed whether the domestic industry was materially injured by reason of imports and considered all relevant economic factors that bear on the state of the industry in the United States.[80] No single factor was dispositive and all relevant factors were considered within the context of the business cycle and the conditions of competition that are distinctive to the domestic industry.[81]

**a. The Commissioners considered the effects that a significant amount of captive production had on the industry as a whole**

57. The Government of Japan is factually incorrect, both as to the relevant statute and USITC practice, when it argues that the captive production provision requires the Commissioners to ignore the domestic industry as a whole and to focus solely on the merchant market.[82] In the present investigation, among the distinctive conditions of competition that the USITC found relevant to its determination was the fact that the domestic industry captively consumes over 60 percent of its production of the domestic like product for the manufacture of downstream

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[77] USITC Views at 5.

[78] USITC Views at 6.

[79] Imports from Japan were cumulated with imports from Brazil and Russia, USITC Views at 9, and Japan is not challenging that cumulation.

[80] USITC Views at 9.

[81] USITC Views at 9.

[82] *See* 19 U.S.C. § 1677(7)(C)(iv).

articles.[83] The USITC also recognized that captive production is relatively sheltered from the effects of import competition.[84]

58. All six Commissioners voted in the affirmative as to injury to the domestic industry in this investigation. Three Commissioners found that the captive productive provision was not applicable to this investigation, and therefore did not primarily focus on the merchant market.[85] Three Commissioners found that the captive production provision did apply in this investigation,[86] and accordingly evaluated the factors listed in the Agreement for both the industry as a whole and as to the merchant market.[87] Under the tie-vote provision,[88] either group of three votes would result in an affirmative determination. Thus, there would have been an affirmative determination regardless of the application of the captive production provision.

59. The Government of Japan has also misstated material facts by representing that the USITC failed to consider relevant factors relating to captive production in its analysis of injury and causation and that the USITC allegedly overlooked the fact that captive production is insulated from import competition.[89] The Commissioners evaluated the factors required by Article 3 of the Anti-Dumping Agreement for the whole industry, however, with three Commissioners also focusing on the merchant market.[90] The Commissioners also explicitly noted that some hot rolled steel producers were more sensitive to the injury caused by dumped

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[83] USITC Views at 9.

[84] USITC Views at 19.

[85] It appears that Japan is not challenging Commissioner Askey's finding of threat of material injury to the domestic industry due to the dumped Japanese imports. *See* First Submission of Japan at para. 82.

[86] USITC Views at 9, 10.

[87] Japan appears to concede this point in part in their brief, stating that "{u}nder U.S. law, if three commissioners find current injury, this is sufficient for an affirmative determination. Three other commissioners found that the provision did not apply, but one of these commissioners nevertheless *considered the same merchant market data in parallel with data on the industry as a whole*." First Submission of Japan at para. 244 (emphasis added). *See e.g.*, USITC Views at 12, discussing the volume of the dumped Japanese imports as to both the whole industry and the merchant market.

[88] 19 U.S.C. § 1677(11).

[89] First Submission of Japan at para. 226.

[90] See USITC Views at 12-21.

imports because they had more merchant market sales and less substantial captive operations.[91] Japan's misrepresentations are explicitly rebutted by the written USITC determination.

### b. The USITC considered all relevant economic factors over the entire period of investigation

60. The Government of Japan has repeatedly and mistakenly stated that the USITC improperly limited its analysis of the domestic industry to two years.[92] The record evidence clearly indicates that the period of investigation was three years, and, accordingly, includes data for the years 1996, 1997, and 1998. Further, despite the incorrect factual assertions made by Japan, the USITC clearly examined trends over the three year period for such relevant factors as absolute volume of dumped imports,[93] market share,[94] overall consumption,[95] domestic shipments,[96] prices,[97] underselling by dumped imports,[98] costs of goods sold (COGS),[99]

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[91] USITC Views at 11, noting that "{w}hen compared to BOF producers, EAF producers are generally more sensitive to competition in the merchant market because more of their production is sold in the spot market, their captive operations are generally not as substantial, and they generally maintain a lower proportion of long term contracts."

[92] Although the Japanese repeatedly assert that the USITC did not use a three year period of investigation, in apparent contradiction to their own argument, they also state that a three year period was used. *See, e.g.* First Submission of Japan at 15, para. 38 stating, "{d}emand for steel continued its growth throughout the period investigated by USITC (1996 through 1998) . . . ."

[93] USITC Views at 12 (dumped imports increased from 1.3 million short tons in 1996 to 3.0 million short tons in 1997 and to 7.0 million short tons in 1998).

[94] USITC Views at 12 (the market share of dumped imports more than doubled from 1996 to 1997, and then doubled again from 1997 to 1998).

[95] USITC Views at 12 (overall consumption in the U.S. market increased throughout the three year period of investigation).

[96] USITC Views at 12, 13 (domestic producers' merchant market shipments, as measured by volume sold, were 21.5 million short tons in 1996 and 21.8 million short tons in 1998; domestic producers' total shipments by volume were 63.3 million short tons in 1996 and 63.8 million short tons in 1998).

[97] USITC Views at 14 n.76 (average unit value of dumped imports declined from $305.36 per short ton in 1996, to $304.46 per short ton in 1997, and to $266.20 per short ton in 1998. The average unit value of imports from Japan declined from $430.66 per short ton in 1996, to $379.72 per short ton in 1997, and to $298.46 per short ton in 1998. For merchant market sales, domestic producers' average unit values were $347.01 per short ton in 1996, increased to $353.86 per short ton in 1997, and then declined below the 1996 level to $330.51 per short ton in

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production capacity,[100] capacity utilization,[101] employment,[102] and capital expenditures.[103] It is incongruous to argue that "the first year of the period was ignored,"[104] despite the fact that the USITC determination clearly demonstrates that a three year period of investigation was used and that three year trends were extensively discussed.[105]

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[97] (...continued)
1998. Overall, domestic producers' average unit values were $343.24 per short ton in 1996, increased to $350.87 per short ton in 1997, and declined below the 1996 level to $335.02 per short ton in 1998.)

[98] USITC Views at 14, 15 (In 1996, there were 29 instances of underselling by dumped imports and 32 instances of overselling. In 1997, the underselling by the dumped imports became more prevalent than in 1996, with 48 instances of underselling by the dumped imports and 16 instances of overselling. In 1998, underselling by the dumped imports was also prevalent with 45 instances of underselling by the dumped imports and 22 instances of overselling. In 1998, the dumped imports from Japan increasingly undersold the domestic merchandise).

[99] USITC Views at 16 (the domestic industry's unit COGS declined during the period of investigation, but this decline was dwarfed by the decline in the domestic industry's average unit values. For merchant market sales, the domestic industry's unit COGS declined by 2.9 percent from 1996 to 1998 and by 0.9 percent from 1997 to 1998; whereas the domestic industry's average unit values declined by 4.8 percent from 1996 to 1998 and by 6.6 percent from 1997 to 1998. Overall, unit COGS declined by 3.5 percent from 1996 to 1998 and by 1.8 percent from 1997 to 1998; whereas average unit values declined by 2.4 percent from 1996 to 1998 and by 4.5 percent from 1997 to 1998).

[100] USITC Views at 17 (the domestic industry increased its capacity from 67.3 million short tons in 1996, to 70.0 million short tons in 1997, and to 73.5 million short tons in 1998).

[101] USITC Views at 17 (capacity utilization rates declined from 94.5 percent in 1996, to 92.6 percent in 1997, and to 87.5 percent in 1998).

[102] USITC Views at 18 (the number of workers declined from 33,965 in 1996, to 33,518 in 1997, to 32,885 in 1998. Hours worked also declined over the three year period from 73,597 in 1996, to 71,634 in 1997, to 68,574 in 1998).

[103] USITC Views at 18 (capital expenditures declined significantly from $1.7 billion in 1996, to $908 million in 1997, and $715 million in 1998).

[104] First Submission of Japan at para. 265.

[105] Japan appears to endorse Commissioner Askey's analysis and use of the three year trends. *See* First Submission of Japan at para. 266. Commissioner Askey made an affirmative determination based on the threat of material injury by reason of the dumped imports, finding that Japanese imports increased substantially over the period of investigation; that the Japanese hot rolled steel producers had excess capacity; that Japanese market share doubled between 1996 and 1997 and then grew 350 percent between 1997 and 1998; and that dumped imports are likely to have a significant depressing or suppressing effect on domestic prices. USITC Views, Additional and
(continued...)

61. In particular, the USITC discussed the fact that dumped import volumes more than doubled in each year over the three year period of investigation.[106] The USITC also found that the market shares of U.S. consumption of dumped imports doubled from 1996 to 1997, and doubled again from 1997 to 1998.[107] The USITC also found significant the fact that, as the market share of nonsubject imports remained essentially flat over the three year period of investigation, and as the dumped imports' volume and market share were dramatically increasing, the U.S. producers share of the market declined.[108] Over the three year period examined, the harm caused by the Japanese imports also was clear to the USITC from the decrease in domestic producers' merchant market shipments, as measured by volume sold, from 1996 to 1998, at a time of constantly increasing U.S. consumption.[109] One of the key factors in the USITC determination is that, as overall consumption in the U.S. market increased throughout the period of investigation, reaching record highs in 1998,[110] the domestic producers were unable

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[105] (...continued)
Dissenting Views of Commissioner Thelma J. Askey at 54-55.

[106] On a quantity basis, the cumulated subject imports increased from 1.3 million shorts tons in 1996 to 3.0 million short tons in 1997, and increased again to 7.0 million short tons in 1998, an overall increase of 419.8 percent from 1996 to 1998, and of 132.5 percent from 1997 to 1998. On a value basis, the cumulated subject imports increased from $410 million in 1996 to $914 million in 1997, and increased again to $1.9 billion in 1998, an overall increase of 353.1 percent from 1996 to 1998, and of 103.3 percent from 1997 to 1998.

[107] USITC Views at 12. In the merchant market, the share held by dumped imports increased from 5.0 percent of apparent U.S. consumption, as measured by volume sold in 1996, to 10.2 percent in 1997, and then increased again to 21.0 percent in 1998. For the industry as a whole, the share held by dumped imports increased from 2.0 percent of apparent U.S. consumption, as measured by volume sold in 1996, to 4.2 percent in 1997, and then increased again to 9.3 percent in 1998.

[108] In the merchant market, the domestic producers' market share declined from 80.4 percent of apparent U.S. consumption in 1996, as measured by volume sold, to 77.8 percent in 1997, and declined again to 65.6 percent in 1998. The domestic industry's market share for the industry as a whole, declined from 92.3 percent of apparent U.S. consumption in 1996, as measured by volume, to 90.8 percent in 1997, and declined again to 84.8 percent in 1998. USITC Views at 12. Nonsubject imports' market share of U.S. consumption was 5.7 percent in 1996, 5.0 percent in 1997, and 5.9 percent in 1998. The market share held by all nonsubject imports, by value, was 6.3 percent in 1996, 5.5 percent in 1997, and 6.3 percent in 1998. USITC Views at Table C-1.

[109] USITC Views at 12, 13.

[110] Total apparent U.S. consumption of hot rolled steel rose from 68.5 million short tons in 1996, to 71.0 million short tons in 1997, and to 75.3 million short tons in 1998. On a merchant market basis, apparent U.S. consumption of hot rolled steel rose from 26.7 million short tons in 1996, to 29.3 million short tons in 1997, and
(continued...)

to participate in the increasing demand because dumped imports dramatically increased in terms of both volume and market share.[111]

62. The USITC likewise found that price trends and underselling data supported the conclusion that dumped imports had significant price depressing effects on the domestic like product.[112] Although prices for both the dumped imports and the domestic like product showed a mixed trend throughout 1996 and mid-1997, they declined thereafter, both as measured by quarterly pricing data and by average unit values.[113] In nearly all instances, the price of the imported and domestic product declined significantly in 1998, at a time when the rise in the volume of dumped imports reached its highest rate.[114]

63. Instances of underselling by the dumped imports increased over the three year period of investigation. In 1998, the final year of the period of investigation, and thus most probative as to the existence of current material injury, underselling by the dumped imports was prevalent.[115] The increased rate of underselling of Japanese imports in 1998 coincided with a shift by Japanese producers to the sale of more commodity grade products.[116] The USITC found that the increased frequency of underselling supported a finding that dumped imports had significant price depressing effects in 1998.

64. The substantially increasing volume of dumped imports at declining prices had a significant negative impact on the domestic industry, as seen in the declining production, shipments, market share, prices, capacity utilization, and financial condition.[117] As stated above, a key factor in the USITC determination was the fact that the dumped imports captured nearly all of the growth in the market in 1998, at a time of record demand. These dumped imports

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[110] (...continued)
33.3 million short tons in 1998. USITC Views at 10.

[111] *See* USITC Views at 12.

[112] USITC Views at 15, 16.

[113] USITC Views at 14.

[114] USITC Views at 14.

[115] USITC Views at 15.

[116] USITC Views at 15.

[117] USITC Views at 20, 21.

prevented the domestic industry from increasing its sales in response to overall increasing U.S. apparent consumption.[118] In fact, the domestic industry lost market share throughout the three year period of investigation.[119] The USITC also found that the domestic industry increased its capacity at a rate largely commensurate with the increasing U.S. consumption from 1996 to 1998,[120] but this increased capacity almost immediately became excess capacity. [121]

65. The domestic industry's performance indicators indicated a sharp decline in 1998 despite the record demand.[122] From 1997 to 1998, as apparent consumption increased significantly, operating income declined by more than half.[123] On merchant market sales, the ratio of operating income to net sales declined from 5.9 percent in 1997 to 0.6 percent in 1998, and overall, the ratio declined from 5.5 percent in 1997 to 2.6 percent in 1998.[124]

66. The USITC found the domestic industry's performance was substantially poorer than what would be expected given the record levels of demand in 1998.[125] Production and capacity utilization rates for nearly the whole industry showed double digit declines from the first half of 1998 to the second half of 1998, both on an overall basis and for the vast majority of individual firms (including both integrated mills and minimills).[126] For the merchant market, apparent U.S. consumption, when measured by volume, increased by 1.69 percent from 16.5 million short tons

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[118] USITC Views at 17.

[119] USITC Views at 17.

[120] USITC Views at 17.

[121] USITC Views at 17. The industry capacity utilization rates declining from 94.5 percent in 1996, to 92.6 percent in 1997, and to 87.5 percent in 1998. As with the industry as a whole, both integrated producers and minimills' capacity utilization steadily declined from 1996 to 1998, despite the overall increasing U.S. consumption. *Id.*

[122] USITC Views at 17.

[123] USITC Views at 18.

[124] USITC Views at 18.

[125] USITC Views at 20.

[126] USITC Views at 20.

in the first half of 1998 to 16.7 million short tons in the second half of 1998.[127] However, overall apparent consumption, when measured by value, declined by 21.64 percent from the first half to the second half of 1998. The USITC concluded that this fact further confirmed that prices declined in the second half of 1998, when dumped imports reached their highest levels,[128] thus contributing to material injury. A comparison of the financial data reported in the preliminary and final phases of the investigation strongly suggested that the industry's operating income worsened from the first half of 1998 to the second half of 1998, when dumped imports reached their highest levels during the three year period of investigation.[129]

### c. The USITC looked at other potential causes of injury to the domestic industry

67. The USITC examined, as a condition of competition, the fact that the domestic hot rolled steel industry consists of both integrated (or "BOF") and minimill (or "EAF") producers.[130] In doing so, the USITC considered the different conditions under which these producers compete. It found that EAF producers are generally more sensitive to competition in the merchant market than BOF producers, in part, because their captive operations are generally not as substantial. The USITC also noted that EAF producers were more sensitive to competition because more of their production is sold in the spot market and they generally maintain a lower proportion of long term contracts.[131] In addition, EAF producers are generally more recent entrants to the industry than BOF producers, and, when compared to BOF producers, EAF producers' lower costs and higher productivity permit them on average to sell hot rolled steel at lower prices.[132]

68. The USITC performed a detailed analysis of the competition between these two types of producers in order to ensure that any resulting adverse effects were not attributed to the dumped imports. Although minimills had a competitive advantage and, therefore, somewhat constrained the prices that integrated mills could command, the USITC found it significant that both EAF and BOF producers' prices declined significantly during the period of investigation, as reflected

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[127] USITC Views at 20.

[128] USITC Views of 20.

[129] USITC Views at 20.

[130] USITC Views at 11.

[131] USITC Views at 11.

[132] USITC Views at 11.

in unit values of shipments and sales.[133] Moreover, domestic producer prices declined dramatically in the latter part of 1998, as dumped import volumes increased at their fastest rate, and domestic prices recovered only as dumped imports exited the market.[134] The USITC concluded from these facts that evidence concerning intra-industry competition did not detract from the evidence establishing that dumped imports caused significant price declines in the latter part of the period of investigation.[135]

69. Further demonstrating this point, the USITC noted that the trends for the industry as a whole, including declines in operating income and the ratio of operating income to net sales, were also apparent for integrated mills and minimills individually.[136] In a comparison of these two types of producers, EAF producers, which are more sensitive to competition from imports, had a worse financial performance than BOF producers in 1997 and 1998.[137] In fact, for merchant market sales, EAF producers had lower operating income to net sales ratios than BOF producers. This lower ratio logically follows from the higher sensitivity of EAF producers to the effects of imports. Tellingly, the EAF producers demonstrated lower operating income to net sales ratios than BOF producers at a period of dramatically increasing dumped imports. Thus, while the USITC recognized that increased competition within the domestic industry was a relevant economic factor, it found that this factor only partially explained the domestic industry's declining performance in 1998.[138] Consistent with its obligation under the Agreement, the USITC examined the known factor of increased competition in the domestic industry, and any injury caused by this factor was accordingly not attributed to the dumped imports.

70. Another condition of competition that the USITC identified was a labor strike at General Motors Corp. ("GM") which lasted for five weeks in June and July 1998.[139] The USITC took into account GM's estimate that the total amount of flat rolled steel (including hot rolled, cold rolled and corrosion resistant steel) that it did not purchase as a result of strike related work

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[133] USITC Views at 15.

[134] USITC Views at 15.

[135] USITC Views at 15, 16.

[136] USITC Views at 19.

[137] USITC Views at 19.

[138] USITC Views at 19.

[139] USITC Views at 11.

stoppages was about 685,000 tons.[140] It evaluated the significance of this fact in light of the total apparent U.S. consumption of hot rolled steel of over 75 million tons in 1998.[141] The USITC further noted that, despite the GM strike, the merchant market and overall consumption of hot rolled steel were at all-time highs in 1998.[142] Thus, the USITC found material injury by reason of dumped imports notwithstanding the strike.

71. In light of the increasing dumped import volume and market share and declining dumped import prices, the USITC reasonably determined that the domestic industry producing hot rolled steel is materially injured by reason of dumped imports from Japan.[143] The USITC specifically recognized that other economic factors, including increased intra-industry competition and the GM strike, contributed to the industry's poorer performance in 1998. However, after taking these factors into account, the USITC's determination demonstrates the causal relationship between the substantially increased volume of dumped imports at declining prices and the industry's deteriorating performance, as reflected in nearly all economic indicators.[144]

## B. The USITC Reasonably Assessed Captive Production in a Manner Consistent with the Anti-Dumping Agreement

### 1. All six commissioners made affirmative determinations regardless of their views on the proper method for examining of captive production.

#### a. Japan's argument mischaracterizes the role of captive production in the determination

72. As an initial matter, this panel should note that only three Commissioners of the USITC found that the captive production provision applied to the hot rolled steel industry.[145] The three

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[140] USITC Views at 11.

[141] USITC Views at Table C-I.

[142] USITC Views at 16.

[143] USITC Views at 21.

[144] USITC Views at 20, 21.

[145] USITC Views at 35.

Commissioners that found that captive production provision did not apply[146] likewise made an affirmative determination with respect to imports of hot rolled steel from Japan. The affirmative votes of these three Commissioners who did not apply the provision, standing alone, are sufficient for an affirmative determination against imports of Japanese dumped hot rolled steel.[147] As a result, even if this panel finds that three Commissioners improperly applied the captive production provision, the affirmative determination against Japanese hot rolled steel would be unaffected. Thus, the challenge to the provision as applied in this case necessarily should fail.

73. Perhaps recognizing this limitation, Japan poses an independent attack on the method of analysis actually employed by the majority of Commissioners, accusing them of "ignoring captive consumption as an important condition of competition."[148] While three of these four Commissioners used the captive production provision in their analysis, Chairman Bragg[149] found that the provision did not apply. She further found, however, that she had the discretion to consider the merchant market in her analysis.[150] Thus, Chairman Bragg joined in the majority's views, noting only that she would have reversed the order in which data for the merchant market and the industry as a whole were considered.[151] In order to include Chairman Bragg's views in their challenge, Japan thus remarkably has taken the position that the USITC erred by having "considered, either primarily or secondarily, the data for the merchant market... ."[152] Therefore, Japan appears to be arguing that the majority's views violate the Anti-Dumping Agreement, the captive production provision notwithstanding.

74. Whether Japan is challenging the use of the captive production provision or contesting

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[146] USITC Views at 25.

[147] *See* § 771(11) of the Act, 19 U.S.C. § 1677(11). Japan only focuses on the section of the statute providing that an affirmative determination exists when three Commissioners find current material injury. First Submission of Japan at para. 244. This statutory provision clearly provides that a finding of threat of material injury, such as that by Commissioner Askey in this case, constitutes an affirmative determination as well.

[148] First Submission of Japan at para. 250.

[149] The chairmanship of the USITC has changed since the time of the investigation, but, for purposes of this discussion, the Commissioners will be referred to by the titles that they had at the time of the investigation.

[150] USITC Views at 29.

[151] USITC Views at 12-21 & nn. 59, 75, 92.

[152] First Submission of Japan at para. 245.

the general assessment of captive production in this case[153] is immaterial because the USITC properly considered captive production in this investigation. The three Commissioners applying the provision found that they were not permitted to disregard the industry's captive consumption.[154] They clearly stated that the statute required them to "determine material injury with respect to the industry as a whole, including the industry's performance with respect to both merchant market operations and captive production."[155] Based on this requirement, these three Commissioners, joined by Chairman Bragg, undertook an analysis which explicitly examined the injury factors with respect to both the merchant market and the entire domestic market in this investigation.

75. For example, as a condition of competition, the USITC discussed the rising apparent domestic consumption in both the merchant market and the total U.S. market.[156] Likewise, despite Japan's arguments to the contrary,[157] when considering the volume of dumped imports, the USITC specifically referenced the market share of dumped imports in the merchant market and in the domestic market for hot rolled steel as a whole, noting that the market share by volume more than doubled from 1996 to 1997 and then again from 1997 to 1998.[158] The USITC then

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[153] First Submission of Japan at para. 245 ("USITC's application of the captive production provision confirms the provision's flawed analytic approach... ."); para. 247 ("The impact of the captive production provision on USITC's determination of facts, and its analysis of those facts... .").

[154] USITC Views at 35 ("The SAA makes clear, however, that we are not to focus exclusively on the merchant market").

[155] USITC Views at 35.

[156] USITC Views at 10. The three Commissioners who applied the captive production provision were joined in this discussion by Chairman Bragg, who did not apply it.

[157] First Submission of Japan at paras. 245-246. In these paragraphs, Japan also characterizes operating profits as "consistent" and "drop{ping} to break-even levels." The USITC looked at the same evidence and simply came to a different conclusion. The USITC looked at the data for the entire market (Table C-1) and the merchant market (Table C-2) and found that operating income declined by more than half. USITC Views at 18. Simply because Japan has a different interpretation of the same evidence does not render the USITC position illegal. Finally, in these same paragraphs, Japan claims that the U.S. industry's financial performance was better in 1998 than in 1996, and because it looked at the merchant market, the USITC did not consider this fact. Many factors make up a consideration of an industry's financial performance, and it is not clear which factors, in particular, Japan alleges that the USITC did not consider.

[158] USITC Views at 12. The USITC specifically recognized that in the merchant market the market share held by dumped imports increased from 5.0 percent by volume of apparent U.S. consumption in 1996 to 10.2 percent in

(continued...)

contrasted these increases with the domestic industry's declining market share in both markets over the period.[159]

76. Based on these findings, the USITC drew conclusions that were consistent with the Article 3.2 directive to "consider whether there has been a significant increase in dumped imports." Notably, this provision does not provide any parameters or limitations for what constitutes a "significant" increase. The significance of the increase depends upon the facts of each case, and, in this matter, the USITC reasonably concluded that the increase was significant.

77. Japan insists that, had the USITC only noticed that import penetration levels never reached double digits, it would have been compelled to find import volumes insignificant. Japan's argument, of course, fails to note that the USITC's findings specifically state the maximum import penetration reached -- 9.3 percent.[160] More importantly, Japan fails to note the applicable provisions of the Agreement in making its argument. Article 3.2 does not fix any particular percentage of import penetration as "significant" or "insignificant". Rather, Article 3.2 requires an examination of the increase in imports to determine whey that increase is significant "either in absolute terms or relative to production or consumption." The USITC took all these measures into account, specifically analyzing the doubling and redoubling of the absolute volumes of import, their rapid increase as a share of total consumption (again by several times), and their effects in preventing increases in U.S. production.[161] The USITC, in examining these factors, took into account all relevant economic factors bearing on the state of the industry consistent with Article 3.4 of the Agreement.[162] Japan states no reason why these findings are not in accordance with the Agreement.

78. Similarly, the majority of Commissioners, who focused on the merchant market,

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[158] (...continued)
1997 and 21.0 percent in 1998. For the industry as a whole, the USITC found that dumped imports held 2.0 percent of the market in 1996, 4.2 percent in 1997, and 9.3 percent in 1998. *Id.*

[159] USITC Views at 12.

[160] USITC Views at 12.

[161] USITC Views at 12-13.

[162] Moreover, this panel should not heed Japan's emphasis on import penetration and omission of the other factors because, under 3.2 of the Anti-Dumping Agreement, "no one or several of {the} factors can necessarily give decisive guidance." Thus, while Japan hinges its case on few highlighted factors, these are not outcome determinative, and the USITC construed these and other factors in a manner consistent with the Anti-Dumping Agreement.

continued their analysis by examining the domestic prices in both the merchant market as well as the overall domestic market for hot rolled steel.[163] Moreover, they determined that the price declines were not a result of declining costs because prices were falling more than costs in both the merchant market and the market overall.[164]

79. Finally, in examining the impact of the dumped imports on the domestic industry, and in response to arguments made by respondents during the course of the investigation, the USITC considered and rejected arguments that the domestic industry's troubles were due to intense competition between minimills and the integrated mills because the data for merchant market sales and total sales for both types of domestic producers showed declines in operating income and ratios of operating income to net sales.[165]

80. In making this finding, the USITC took into account the fact that minimills performed worse than integrated producers. It attributed this poorer performance, in part, to the minimill's "greater dependence on the merchant market, where imports are concentrated."[166] Thus, despite Japan's consistent contention that the USITC ignored this fact,[167] the USITC took into account the fact that captive production is largely shielded from the effects of imports.

81. In any event, the trends exhibited in the merchant market mirrored the trends for the industry overall. Consequently, the Japanese challenge to the majority's analysis based on the fact that they considered the merchant market data should be dismissed as irrelevant.

82. Moreover, as noted above, even those Commissioners who did not apply the captive production provision found that they had the discretion to consider the captive production as a condition of competition.[168] These Commissioners examined data for both the domestic industry

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[163] USITC Views at 14 n.76, 15 n.83.

[164] USITC Views at 16 and n.88.

[165] USITC Views at 19 nn.105 & 106.

[166] USITC Views at 19.

[167] First Submission of Japan at paras. 251, 254.

[168] USITC Views at 29.

as a whole and for merchant market operations.[169] Some of these Commissioners merely placed different emphasis on the merchant market data.

**b. The views of the Commissioners who did not apply the captive production provision do not undermine the validity of the views of those Commissioners who did apply it**

83. Japan has made an attempt to discredit the USITC's views by drawing a false distinction between the views of Chairman Bragg (who did not apply the captive production provision) and the views of the Commissioners who did apply this provision. Whereas Japan states that those Commissioners who applied the provision ignored captive production, it avers that Chairman Bragg considered the merchant market "in parallel" with the industry as a whole.[170] Japan appears to differentiate the opinions in this manner despite the fact that, as already mentioned, Chairman Bragg joined in the majority opinion with the three Commissioners who applied the captive production provision. These four Commissioners thus all had the exact same views and analysis, and the Japanese attempt to distinguish them is disingenuous. Japan's characterization of Chairman Bragg's analysis is the correct characterization of the decision -- these Commissioners considered the merchant market "in parallel" with the industry as a whole.

84. Commissioner Crawford stated that she examined the data for the merchant market but chose to base her determination on the "total domestic market and the domestic industry as a whole."[171] Although she used a different approach from the majority of the USITC for analyzing the effects of the significant captive consumption because she did not "evaluate the effects of imports on the merchant market,"[172] Commissioner Crawford did examine the effect of having only 40 percent of the domestic like product compete with dumped imports in the merchant market.[173] She found that the dumped imports could "at best be considered as moderate substitutes" for the domestic like product because of the large amount of domestic captive

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[169] USITC Views at 29.

[170] First Submission of Japan at paras. 244, 250.

[171] USITC Views at 29 & n.21.

[172] USITC Views at 39.

[173] USITC Views at 44.

consumption.[174] This finding of a moderate degree of substitutability, in turn, affected her analysis of prices when she found that, at fairly traded prices, it is likely that the demand for dumped imports would have shifted to the domestic like product and that the shift in demand from dumped imports would have been extremely large.[175]

85. The analysis performed by Commissioner Crawford undercuts Japan's argument that the majority made an affirmative material injury finding only because it "ignore{d} the attenuated nature of import competition" in the captive market.[176] As already noted, those Commissioners that explicitly relied on data from the merchant market did not ignore the fact that the captively consumed production is shielded from competition. In any event, even after finding that domestic and imported products have limited substitutability because of the large amount of captive consumption, and thus squarely addressing the shielding issue, Commissioner Crawford still found that dumped imports materially injured the domestic producers. Therefore, Japan's suggestion that proper consideration of the captive production provision should inevitably lead to a negative material injury finding is belied by the material injury finding Japan does not challenge.

86. Finally, although Commissioner Askey also made an affirmative determination, Japan inexplicably relies on her decision in support of its position.[177] Commissioner Askey, like the other Commissioners, found that the financial indicators were worse in 1998 than in 1997 and that dumped imports rose and captured market share by supplying increased demand.[178] She took a different view of the evidence than the other Commissioners, however, in that she determined that the industry's continued profitability and high capacity utilization rates weighed in favor of a negative material injury determination. Instead, she found that the evidence pointed toward a threat of material injury. Japan claims that Commissioner Askey's recognition that captive production shielded the domestic industry from import competition "led inexorably to her negative determination on present material injury."[179] It fails to take into account, however, that her findings on captive production did not lead her ultimately to make a negative determination

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[174] USITC Views at 44.

[175] USITC Views at 47.

[176] First Submission of Japan at para. 226.

[177] First Submission of Japan at paras. 251-52.

[178] USITC Views at 52.

[179] First Submission of Japan at para. 251.

in this investigation.

87. Moreover, the logical link from a recognition of the limited competition to a negative material injury determination is not readily evident. As already noted, Commissioner Crawford drew the same conclusion about the nature of competition but still found present material injury. In any event, Commissioner Askey still made an affirmative determination, although it was one based on threat of injury and not material injury. Therefore, any incorrect application of the captive production provision by the other Commissioners not only did not dictate the outcome of this case, but an application of the provision in a manner that Japan deems appropriate would have led to the same result.

88. All six Commissioners made an affirmative determination in this investigation whether or not they applied the captive production provision and whether or not they focused on data for the merchant market. Therefore, the captive production provision is irrelevant to the outcome of ths investigation. In any event, those Commissioners who examined data for the merchant market also properly considered the industry as a whole. Thus, the USITC's analysis was consistent with the Anti-Dumping Agreement.

### 2. Contrary to Japan's argument, the treatment of captive production did not result in different outcomes in the 1993 hot rolled determination and the current hot rolled case

89. Japan seeks to ascribe error to the USITC's determination in this matter by drawing a false comparison between the outcome in this case and the outcome in an earlier hot rolled steel investigation, which was completed before Congress enacted the captive production provision.[180] The facts of these two cases are substantially different, however, so that any comparison between them is meaningless. Therefore, to the extent that the approaches to captive production were different in these two cases, any attempt to impute the different outcomes to this divergence should fail.

#### a. The approach to captive production in the 1993 hot rolled case was not pivotal in its outcome or point to a practice contrary to the analysis in this case

90. In 1993, as part of a larger case dealing with flat rolled steel, the USITC issued a negative

[180] First Submission of Japan at paras. 248-250.

determination as to hot rolled steel products.[181] In that case, the USITC took a slightly different approach to an assessment of captive production than that articulated in the captive production provision. It took captive production into account as a condition of competition,[182] but it did not provide a factor-by-factor assessment for the merchant market and the industry as a whole. Although Japan claims that the recognition of a substantial amount of captive production that was shielded from injury was a "factor that contributed significantly to {the USITC's} negative injury and threat determinations" and "proved pivotal" to the outcome in that case, [183] the USITC, in fact, based its negative determination on the lack of a causal nexus between dumped imports and the injury to the domestic injury.[184] In fact, the USITC first analyzed the evidence and found no causal nexus; then, following that finding, and quite apart from it, reiterated its conclusion that the dumped imports had little or no effect on the substantial amount of production that was captively consumed.[185] Therefore, as detailed further below, the difference in approaches to captive production in *1993 Hot Rolled Steel* and the current hot rolled case did not determine the difference in results.

91. As an initial matter, Japan is incorrect in characterizing the approach to captive production in *1993 Hot Rolled Steel* as the "traditional approach" to captive production analysis.[186] Although this type of analysis was used by the USITC in many cases prior to the enactment of the captive production provision, other cases used an approach similar to that codified in the captive production provision. For example, in *Stainless Steel Wire Rod From Brazil and France ("SSWR")*,[187] which was completed before Congress enacted the captive production provision, the USITC examined data from the merchant market side-by-side with the data for the industry as a whole in a manner very similar to the way the analysis was done in the

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[181] *Certain Flat Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom*, Inv. Nos. 701-TA-319-332, 334, 336-342, 344, and 347-353 (Final) and Inv. Nos. 731-TA-573-579, 581-592, 594-597, 599-609 and 612-619 (Final), USITC Pub. 2664 (August 1993) ("*1993Hot Rolled Steel*") (**Exh. Jp-59**).

[182] *1993 Hot Rolled Steel* at 21.

[183] First Written Submission of Japan at paras. 219, 239.

[184] *1993 Hot Rolled Steel* at 52.

[185] *1993 Hot Rolled Steel* at 53.

[186] First Submission of Japan at para. 250.

[187] Inv. Nos. 731-TA-636 and 637, USITC Pub. 2721 (January 1994) (**Exh. US/C-11**).

current investigation. In *SSWR*, the USITC found that "{a}pparent U.S. consumption (including captive consumption) of SSWR on the basis of quantity increased . . . {and} {o}pen market apparent consumption grew at an even faster rate."[188] It also examined net sales (including company transfers) and "trade only net sales." and "operating income margins" along with operating margins for "trade only operations."[189] Finally, the USITC examined the volume and increase in volume of dumped imports for both the merchant market and the industry as a whole.[190] Thus, the captive production provision is consistent with the analysis performed in investigations predating it.

**b. The facts of the current case and the 1993 hot rolled case are significantly different and do not support Japan's attempted analogy between the cases**

92. Nevertheless, to the extent that the analyses in *1993 Hot Rolled Steel* and the current case diverge, the differences did not dictate the different outcomes in these cases. The USITC found no causal nexus in *1993 Hot Rolled Steel* based on conditions of the industry at the time, and these conditions did not exist at the time of the later determination currently under review. For example, the USITC found that "slab offerings," prime quality or secondary products that are sold to purchasers other than the primary purchaser for which they were produced, were sold to about one-fourth of all purchasers and were discounted by five to twenty percent.[191] It found that these slab offerings were one of many other factors affecting the domestic industry.[192] Slab offerings were not a relevant factor in the determination currently under review.

93. Also, in the *1993 Hot Rolled Steel* case, in part as a result of a recession, total apparent consumption of hot rolled steel dropped and then rose again, from 51.6 million tons in 1990 to 44.5 million tons in 1991 to 50.6 million tons in 1992.[193] Thus, consumption over the entire period had actually declined slightly. Further, the domestic industry's share of this consumption fell only slightly over each period in the investigation, from 94.4 percent in 1990 to 93.3 percent

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[188] *SSWR* at I-13.

[189] *SSWR* at I-15 nn.53, 54.

[190] *SSWR* at I-21 and nn.98, 99.

[191] *1993 Hot Rolled Steel* at 21.

[192] *1993 Hot Rolled Steel* at 52.

[193] *1993 Hot Rolled Steel* at 21.

in 1992,[194] while the market share of dumped imports remained low over the period, although they increased slightly, ranging from 1.9 to 3.8 percent in 1990 to 3.3 to 4.4 percent in 1992. Thus, based on these relatively minor increases in the already low market shares of dumped imports, the USITC concluded that the dumped imports were not significant.

94. The facts of that case stand in stark contrast to the hot rolled case currently under review. During the current period of investigation, demand for hot rolled steel was strong, reaching record highs in 1998.[195] Total apparent U.S. consumption was 68.5 million tons in 1996 and rose to 71.0 million tons in 1997, further increasing to 75.3 million tons by 1998.[196] Domestic producers' total market share declined over this same period, from 92.3 percent of total apparent U.S. consumption in 1996 to 90.8 percent in 1997 and 84.8 percent in 1998. Meanwhile, the total market share held by dumped imports from 1996 to 1997 more than doubled each year, going from 2.0 percent of apparent U.S. consumption in 1996 to 4.2 percent in 1997, and then doubling again in 1998 to 9.3 percent.[197] Thus, the USITC noted that, at the same time as dumped imports were increasing their volume and market share dramatically, the domestic industry's market share declined. Moreover, the USITC found that "domestic producers were prevented from participating in the increasing demand as dumped imports increased their market share."[198] The inverse relationship between the dumped imports and the domestic like product that existed during the current period of investigation and the high levels and increases in demand evidenced during that time simply did not exist in the *1993 Hot Rolled Steel* case.

95. In addition, during the *1993 Hot Rolled Steel* investigation, prices of the dumped imports were generally higher than the domestic like product, and, although they fell irregularly over the period, they generally fell less than the domestic prices. In fact, some prices of dumped imports actually rose over the period. At the same time, the prices for the domestic like product fell over the period.[199] A clear correlation between underselling and falling prices thus did not exist during the *1993 Hot Rolled Steel* investigation where overselling was the norm. Once again, these facts bear no resemblance to the facts currently at hand. The USITC found that prices for

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[194] *1993 Hot Rolled Steel* at 21.

[195] USITC Views at 10.

[196] USITC Views at 10.

[197] USITC Views at 12.

[198] USITC Views at 12.

[199] *1993 Hot Rolled Steel* at 48.

the dumped imports and the domestic product showed mixed trends through mid-1997, and then fell through the end of the period. It also found a mixed pattern of underselling, with more instances of underselling in 1997 and 1998. It determined that "the increased frequency of underselling is consistent with the price depressing effects of the subject imports in 1998."[200]

96. Finally, the only finding from the *1993 Hot Rolled Steel* case that Japan highlights is the finding about the industry's poor operating performance.[201] Japan correctly notes that the industry's operating performance in that case was substantially worse than that in the present one.[202] For example, in that case, the domestic industry started with an operating income of $39 million in 1990 and saw that sum drop to $1.3 billion operating loss by 1992.[203] In the present case, although the USITC found that the domestic industry's operating income declined by more than half, by 1998 the industry still had an operating income of $560 million.[204]

97. Japan ignores the findings of the USITC in each case that led to this seemingly anomalous result, however. The USITC did not find that the U.S. industry in 1993 was not suffering injury. Rather, it found no injury by reason of dumped imports because it found, "no causal nexus between increases in import penetration and pricing and declines in the domestic industry's performance. For example, the market share of the cumulated subject imports increased more from 1991 to 1992 than from 1990 to 1991. Conversely, profitability of the domestic industry declined from 1990 to 1991 and rebounded slightly from 1991 to 1992."[205] In the current case, as described above, timing issues supported an affirmative determination. For example, the USITC found that the declines in the ratio of operating income to net sales was due largely to declines in the unit values of the domestic industry's shipments and sales, and the unit values "fell significantly in 1998 as subject imports increased in volume and market share."[206] The two cases have different results based on the factual distinctions, not because of any difference in the methodology for analyzing captive production.

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[200] USITC Views at 14-15.

[201] First Submission of Japan at para. 248.

[202] First Submission of Japan at para. 248.

[203] *1993 Hot Rolled Steel* at 23.

[204] USITC Views at 18, Table C-1.

[205] *1993 Hot Rolled Steel* at 52-53.

[206] USITC Views at 18.

## C. The USITC Properly Used a Three Year Period of Investigation and Conducted an Objective Examination of the Data Collected over That Period

98. The USITC correctly analyzed the data it collected by comparing the information within the period of investigation, *i.e.,* from year-to-year and in interim periods, in addition to comparing the information at the beginning of the period with the information at the end of the period. The Anti-Dumping Agreement does not establish any particular period of investigation pertinent to injury determinations, and it certainly does not delimit any method by which the data collected for that period must be analyzed. It is thus within the discretion of the administering authority to ascertain a reasonable means for interpreting the data, and the USITC appropriately analyzed the data in this case.

### 1. The USITC used a three year period of investigation

99. The Japanese argument with regard to the USITC's collection and use of data is somewhat misleading and unclear. At times it seems to acknowledge that the USITC used a three year period of investigation,[207] while at other times it appears to be arguing that the USITC did not collect data for a three year period.[208] The record clearly reflects that the USITC collected data over a three year period. Table C-1 of the USITC's report provides a summary of the data collected over the course of the investigation.[209] A simple reading of this table shows that data was collected by the USITC staff for the years 1996, 1997, and 1998. Thus, the USITC properly collected data over a three year period.

100. Although its argument is ambiguous, Japan does not appear to be contesting the appropriateness of using a three year period of investigation. Regardless, the Anti-Dumping Agreement is silent as to the period of data collection, and the United States made a reasonable choice in using a three year period. The reasonableness of this decision is underscored by the opinion given by the Committee on Anti-Dumping Practices in a recommendation, including a statement in favor of using at least a three year period for data collection in injury

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[207] First Submission of Japan at para. 261 ("USITC focused on data for only two years of its three-year period of investigation").

[208] First Submission of Japan at para. 262 ("with only two data sets, one cannot know whether a high level for the first year is anomalous or not"); para. 267 ("{i}n manipulating its traditional three year period of investigation...").

[209] USITC Views at C-3.

investigations.[210]

### 2. The USITC, consistent with Article 3 of the Anti-Dumping Agreement, established the causal relationship between dumped imports and material injury based upon an objective evaluation of changes in relevant economic factors over the three-year period.

#### a. The USITC evaluated data over the entire period investigated

101. Japan contests the methodology used by the USITC for analyzing the information obtained over the three year period.[211] Its allegation that the USITC "eschewed its traditional three year analysis and, instead, compared 1998 with 1997" is simply untrue. The USITC, in fact, examined the data over the full three year period. For example, when considering the volume of dumped imports, the USITC found that they "increased over the investigation period, more than doubling from 1996 to 1997 and more than doubling again from 1997 to 1998."[212] In addition, the USITC found that "{t}he market share held by subject imports also more than doubled from 1996 to 1997 and again from 1997 to 1998."[213] With regard to price, the USITC also mentioned the mixed trend of prices for both the domestic like product and the dumped imports from 1996 to mid-1997, and then remarked upon the fact that prices fell for the remainder of the period with the greatest decreases occurring in the third and fourth quarters in 1998.[214] Finally, the USITC discussed the trend of performance over the entire period of investigation for those impact factors listed in Article 3.4 that it determined were relevant to its investigation.[215]

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[210] Committee on Anti-Dumping Practices, *Recommendation Concerning the Periods of Data collection for Anti-Dumping Investigations,* adopted by the Committee on 5 May 2000, G/ADP/6, at para. 1(c).

[211] First Submission of Japan at para. 263, et. seq.

[212] USITC Views at 12.

[213] USITC Views at 12.

[214] USITC Views at 14.

[215] USITC Views at 12-13 (discussing shipments), 17-18 (discussing capacity and capacity utilization), nn. 100, 101 (discussing productivity, employment, wages, inventory, and factors bearing on profitability -- one firm filed for bankruptcy and unit production costs). Production is accounted for in the USITC's finding that capacity increased commensurate with demand but "the domestic industry's increased capacity almost immediately became excess capacity." USITC Views at 17. In other words, production did not increase.

102. Japan merely is asking this panel to reweigh the factors considered by the USITC when it asserts that "all the major domestic industry performance indices improved" over the 1996 to 1998 period and that this improvement normally would result in a finding of no material injury.[216] The USITC looked at these indicators over the entire period and came to a different conclusion. No combination of factors can give decisive guidance as to the ultimate finding of material injury.[217] As already noted, it is not the role of this panel to reassess the factors already considered by the USITC. The USITC may reasonably find that the overall picture shows material injury even when some of the indicators are not declining.[218] In this case, the USITC looked at the state of the domestic industry from 1996 to 1998 and, consistent with the Anti-dumping Agreement, concluded that it was suffering material injury.

### b. Reliance on recent trends is appropriate in determining current material injury because it appropriately recognizes changes in economic circumstances

103. To the extent that Japan correctly notes the USITC's focus on the most recent period for evaluating some factors and is challenging that method of evaluating the facts, its challenge should not prevail. In *Argentina -- Footwear*, the Appellate Body found that, for the purposes of safeguards actions, an examination of recent imports is necessary in order to determine whether the product "is being imported" in increased quantities.[219] The Safeguards Agreement and the Anti-Dumping Agreement thus share the same goal of assessing the present condition of the domestic industry and dumped imports. If, for purposes of an injury determination in a safeguards investigation, the Safeguards Agreement *requires* an examination of the most recent period, the Anti-Dumping Agreement can hardly be said to *prohibit* a focus on recent events for an injury finding in anti-dumping investigations.

104. Moreover, the USITC's findings on trends in the most recent period are consistent with Article 3.4's command to examine all relevant economic factors and Article 3.5's dictate to examine all relevant evidence before the authorities. In the present case, as discussed above, the

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[216] First Submission of Japan at para. 263.

[217] Article 3.4 of the Anti-Dumping Agreement.

[218] Appellate Body Report, *Argentina -- Safeguard Measures on Imports of Footwear* ("*Argentina -- Footwear*"), WT/DS121/8, adopted Dec. 14, 1999 at para. 139.

[219] *Argentina-Footwear* at para. 130. The Appellate Body found a that "'is being imported' implies that the increase in imports must have been sudden and recent." *Argentina-Footwear* at para. 130. The Anti-Dumping Agreement language does not share in the Safeguard Agreement's suddenness requirement.

USITC found that the behaviors of dumped imports and the domestic industry underwent a dramatic change in the 1997 to 1998 period. For example, in 1998, total apparent consumption was at a record high.[220] In addition, in 1998, when dumped imports' volume and market share had the largest increases from the previous year, the U.S. industry had its greatest declines.[221] Further, "from 1997 to 1998, total apparent U.S. consumption increased by 6.0 percent, while domestic shipments declined by 1.0 percent, as measured by volume."[222] Finally, there was an increased frequency of underselling in 1998.[223] As a result, a focus on this period was warranted. All these factors combined show that the import pattern of dumped imports was changing in the later period, and these changes in the marketplace are relevant economic factors bearing on the decision of whether dumped imports are causing material injury to the domestic industry as a whole. Therefore, the USITC reasonably gave particular attention to this latter period.

105. Regardless, Japan contests the use of the later period in this case because it claims that 1997 was a banner year for the steel industry such that any comparison to this year would necessarily skew the result toward an affirmative determination.[224] Japan's arguments, however, ignore the USITC's findings concerning the changes in relevant economic factors that had occurred over time. The USITC noted, for example, that the domestic industry had greater productivity and lower costs in 1998 than in 1997.[225] As a result, operating income should have been increasing, not decreasing, as it in fact was. Moreover, demand increased from 1997 to 1998 (a point noticeably absent from Japan's banner year argument), yet production and shipments declined and operating income as a ratio to net sales also dropped.[226] These changes created a new economic context for the performance of the industry.

106. The USITC found that numerous factors had declined from 1996 to 1997 and continued to decline in 1998. For example, it specifically noted declines in the domestic industry's market

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[220] USITC Views at 10.

[221] USITC Views at 12.

[222] USITC Views at 13.

[223] USITC Views at 15.

[224] First Submission of Japan at para. 264.

[225] USITC Views at 18.

[226] USITC Views at 10, 12-13, 18.

share,[227] domestic shipments,[228] prices,[229] capacity utilization,[230] employment indicators,[231] and capital expenditures.[232] Regardless of those indicators that Japan points to in justifying its banner year argument, the USITC controlled sufficiently for any factors that would distort its reasoning, noted the basis for its determination, and reasonably concluded that the performance in 1998 should have been better than in 1997. Although the factors that Japan focuses on differ from those that the USITC highlighted, Article 3.4 provides that no one or several of these factors necessarily can give decisive guidance. Therefore, this panel should find that the USITC's interpretation of the evidence was reasonable.

### c. Reliance on recent trends is in keeping with USITC practice

107. Contrary to Japan's contention, the USITC's attention to the latter period was in no way "unique."[233] The USITC frequently looks to the most recent period in conducting its analysis. In fact, it has found that "we consider data for the latter part of the period of investigation to be the most probative of the condition of the industry and the impact of subject imports on that

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[227] USITC Views at 12 (the market share of dumped imports more than doubled from 1996 to 1997, and then doubled again from 1997 to 1998).

[228] USITC Views at 12, 13 (domestic producers' merchant market shipments, as measured by volume sold, were 21.5 million short tons in 1996 and 21.8 million short tons in 1998; domestic producers' total shipments by volume were 63.3 million short tons in 1996, and 63.8 million short tons in 1998).

[229] USITC Views at 14 (For merchant market sales, domestic producers' average unit values were $347.01 per short ton in 1996, increased to $353.86 per short ton in 1997, and then declined below the 1996 level to $330.51per short ton in 1998. Overall, domestic producers' average unit values were $343.24 per short ton in 1996, increased to $350.87 per short ton in 1997, and declined below the 1996 level to $335.02 per short ton in 1998.)

[230] USITC Views at 17 (capacity utilization rates declined from 94.5 percent in 1996, to 92.6 percent in 1997, and to 87.5 percent in 1998).

[231] USITC Views at 18 (the number of workers declined from 33,965 in 1996, to 33,518 in 1997, to 32,885 in 1998. Hours worked also declined over the three year period from 73,597 in 1996, to 71,634 in 1997, to 68,574 in 1998).

[232] USITC Views at 18 (capital expenditures declined significantly from $1.7 billion in 1996, to $908 million in 1997, and $715 million in 1998).

[233] First Submission of Japan at ¶ 265.

industry."[234]

108. The USITC focuses on the latter periods when there is some change in the industry that warrants this type of analysis. For example, even Japan notes that in *Fresh Garlic From the People's Republic of China*,[235] the USITC found the domestic industry suffered material injury primarily from price depression and volume displacement of dumped imports in the last year of the period of investigation.[236] In conducting its analysis, the USITC focused on the "massive increase" of dumped imports in the last year of investigation which resulted in domestic industry operating losses for the first time during the period.[237] Similarly, in *Certain Emulsion Styrene-Butadiene Rubber from Brazil, Korea and Mexico*,[238] the USITC found that the domestic industry was not materially injured because the increases in dumped imports occurred early in the period of investigation. Moreover, this mode of analysis has been employed by the USITC for many years. In 1982, the USITC made an affirmative countervailing duty determination in *Nitrocellulose from France*,[239] noting that "the greatest declines in the indicators of the condition of the domestic industry occurred during the most recent months."

109. The cases cited by Japan to counter this argument do not have any bearing on the issue at hand. In *Elastic Rubber Tape from India*,[240] the USITC found that the performance of the industry in the latter period was a one-time "anomalous" event. It, therefore, properly did not

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[234] *Fresh Atlantic Salmon from Chile*, 731-TA-768 (Final), USITC Pub. 3116 (July 1998) at 14 (**Exh. US/C-12**).

[235] Inv. No. 731-TA-683 (Final), USITC Pub. 2825 at I-27 (Nov. 1994) (**Exh. US/C-13**).

[236] First Submission of Japan at n.247.

[237] Japan attempts to assuage the impact of the USITC's analysis by citing the USITC's acknowledgment of declines in domestic industry profitability throughout the period of investigation. However, simply because the USITC acknowledged other industry conditions within the period is irrelevant. The 576.2 percent increase in the volume of dumped imports in the last year of the period of investigation constituted a significant change in the industry resulting in a sudden and sizable loss of injury to the domestic industry.

[238] Inv. No. 731-TA-794-796 (Final), USITC Pub. 3190 (May 1999) at 16 (**Exh. US/C-14**). Also, in *Extruded Rubber Thread from Indonesia*, Inv. No. 731-TA-787 (Final), USITC Pub. 3191 (May 1999) at 9-11 (**Exh. US/C-15**), the USITC concluded that, despite negative factors at the beginning of the period of investigation, improvement in prices and financial performance precluded a finding of material injury.

[239] Inv. No. 701-TA-190 (Preliminary), USITC Pub. No. 1304 (Oct. 1982) at 6 (**Exh. US/C-16**).

[240] Inv. No. 731-TA-805 (Final), USITC Pub. 3200 (June 1999) at 14 (**Exh. US/C-17**).

base a decision of injury on that information. In *Stainless Steel Round Wire From Canada, India, Japan, Korea, Spain, and Taiwan*,[241] the USITC's determination was negative (a point the Japanese seem to ignore) precisely because of the domestic industry's improvement in the latter part of the period. The USITC noted that in the later period, at the peak of dumped import underselling, the domestic industry's operating profit margins increased.[242] In *Certain Carbon Steel Plate from China, Russia, South Africa, and Ukraine*, the USITC made a negative present injury determination, not because of the trends in the latter parts of the period of investigation, but because it found that the adverse impact during this period was "not of sufficient magnitude" to warrant a finding of material injury. Therefore, despite the Japanese allegation to the contrary, considering the later part of the period of investigation and putting emphasis on the condition of the industry at that time is consistent with past USITC practice when the information is relevant to the determination that the USITC must make.

110. The USITC properly collected data for a three year period of investigation. In addition, it evaluated that data in a manner consistent with its obligations under the Anti-Dumping Agreement. It looked at information over the entire period and, in addition, properly gave particular consideration to the information from the later period when changes in the industry's performance warranted such emphasis.

## D. The USITC Determination, Consistent With Article 3, Examined the Relevant Factors and Did Not Attribute the Adverse Effects of Other Known Factors to the Japanese Dumped Imports

### 1. The requirements of Article 3 of the Anti-Dumping Agreement

111. Japan appears to allege that the USITC's determination of injury was inconsistent with the Anti-Dumping Agreement in that its examination of the causal relationship between dumped imports and injury to the domestic industry was inadequate. This objection is completely without merit. The causation standard relevant to this review is set forth in Article 3.5 which states, in part, that "{i}t must be demonstrated that the dumped imports are . . . . causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities."[243] The USITC's determination clearly articulated its reasons for

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[241] Inv. Nos. 731-TA-781-786 (Final), USITC Pub. 3194 (May 1999) at 16-17 (**Exh. US/C-18**).

[242] *See id.* at 15.

[243] Article 3.5 states:
It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in

(continued...)

finding the causal link between the dumped imports and material injury. The USITC determination was based upon an objective examination of the positive evidence including the volume of the dumped imports, the effect of the dumped imports on prices in the domestic market, and the consequent impact of these imports on the domestic producers of such products.[244]

112. Japan specifically alleges that the adverse effects of other market factors were wrongfully attributed to the dumped imports. Article 3.5 of the Anti-Dumping Agreement sets forth the relevant obligation with respect to other causes of injury, namely: "{t}he authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports." The USITC's determination more than satisfied this requirement. It is significant that Japan has not challenged the USITC's factual findings of increasing dumped imports, declines in prices for the domestic product, or the negative impact on the domestic industry of the dumped imports during the period of investigation. As required by the Anti-Dumping Agreement, the USITC demonstrated, through undisputed facts, that the dumped imports are causing injury to the U.S. industry. While the authority is also to examine other known factors, the purpose for doing so is to assure that it is not attributing to dumped imports injury due to other known factors, not to demonstrate what effects other factors may or may not be having. Article 3.5 thus requires only a specific demonstration of the causal link, not a demonstration concerning other known factors.

113. The fact that the USITC did not attribute injury from other causes to the dumped imports

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[243] (...continued)
paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade-restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

[244] This examination was consistent with the ITC's obligation under Article 3.1 of the Agreement which states: A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

is obvious from its discussion of the facts, from which it demonstrated the causal relationship between dumped imports and material injury. Nonetheless, the USITC explicitly discussed alleged alternative causes of injury and gave a detailed discussion of the reasons that it believed that the dumped imports were causing material injury despite any contributions made by these alternative causes. Therefore, the USITC satisfied the requirements of the Article 3.5 second sentence, both by its affirmative findings concerning the significance of dumped imports and by its explicit findings concerning asserted alternative causes.

114. The Anti-Dumping Agreement does not require the USITC to somehow quantify the injury from causes other than the dumped imports supported by the Agreement. The requirement not to attribute the harm from other causes to the dumped imports, as stated in Article 3.4, was interpreted in *United States -- Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87 (27 April1994) (*United States - Atlantic Salmon).* In that case, which arose under the Tokyo Round Anti-dumping Code, the panel specifically stated that the requirement "not to attribute injuries caused by other factors to the imports ... did not mean that, in addition to examining the effects of imports under Articles 3:1, 3:2 and 3:3, the USITC should somehow have identified the extent of injury caused by these other factors in order to isolate the injury caused by these factors from the injury caused by the imports from Norway."[245]

115. Although Article 3.5 of the Anti-Dumping Agreement clarifies that the USITC is obligated to examine any "known factor" other than the dumped imports which is injuring the domestic injury, it repeats the language of the Tokyo Round Code, defining the obligation not to attribute injuries caused by other actors. As the Code Committee panel observed in *Atlantic Salmon*, that Agreement set out numerous factors that authorities are required to consider in establishing a causal link between dumped imports and injury, but it established no criteria for satisfying the requirement not to attribute injury from other causes to the dumped imports. The same is true of the Anti-Dumping Agreement. Thus, the USITC's analysis in the present case, which expressly, and with particularity, examined other known factors, more than satisfied the requirements in the Agreement.

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[245] *United States -- Atlantic Salmon* at 555.

### 2. The asserted other factors

116. Japan's arguments simply ignore the USITC's actual findings. Consistent with Article 3.4 of the Anti-Dumping Agreement,[246] the USITC found the injury caused by the dumped imports, holding that no single factor was dispositive and that all relevant factors must be considered within the context of the business cycle and noting the conditions of competition that are distinctive to the affected industry. Japan appears to argue that there were four alternative causes of injury to the domestic industry, namely a strike at General Motors (GM), increased intra-industry competition particularly from EAF (Electric Arc Furnace, also known as "minimill") producers, price effects of nonsubject imports, and a decline in demand for a subsection of the hot rolled steel industry. The USITC specifically considered and then rejected these arguments, and its conclusions regarding all other known causes are readily apparent from all the findings it made.

#### a. The General Motors strike

117. As to the GM strike, the USITC acknowledged the respondents' arguments that the strike was responsible for declines in domestic prices in 1998. However, consistent with the Agreement, the USITC evaluated the dumped Japanese imports' effects on prices by examining the significant price undercutting by the dumped imports and whether the effect of such imports was otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree.[247] The USITC explicitly stated that it considered the Japanese argument and did, in fact, agree that the GM strike had some effect on overall demand in 1998 and, hence, played some role in contributing to declining domestic prices.[248]

118. However, the Commissioners observed that the strike only lasted for five weeks and the total quantity of material not purchased during the GM strike (no more than 685,000 tons of all

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[246] *See* Article 3.4 "This list {of relevant economic factors} is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."

[247] Consistent with Article 3.2, the USITC recognized that the quarterly pricing data indicated a mixed pattern of underselling by the dumped imports, but that the frequency of underselling increased significantly in the later part of the period of investigation. Specifically, in 1998, the USITC found that underselling by the dumped imports was prevalent: with 45 instances of underselling by the dumped imports and 22 instances of overselling. The USITC further found that the increased frequency of underselling was consistent with the price depressing effects of the dumped imports in 1998. USITC Views at 14, 15.

[248] USITC Views at 16.

types of flat rolled steel[249]) was not large enough to explain the extent of price declines which occurred in 1998.[250] The GM strike affected a very modest 685,000 tons of U.S. production of all flat rolled steel, in comparison to total apparent U.S. consumption of hot rolled steel of over 75 million tons in 1998; however, average unit values decreased from $308.85 in 1997 to $297.22 in 1998, a 3.8 percent decrease.[251]

119. The USITC further noted that, despite the GM strike, the merchant market and overall consumption of hot rolled steel were at all-time highs in 1998.[252] One would reasonably expect prices to increase, not decrease, in times of record demand for the product.[253] The USITC, therefore, based on an objective examination of the relevant evidence, reasonably concluded that the GM strike was, at most, a partial explanation for declining prices in 1998.[254] As the Code Committee panel recognized in *United States-Atlantic Salmon*, there may be other causes of price suppression effects and an authority need not isolate the particular effects of dumped imports from the effects of other causes in order to establish that dumped imports have a significant price depressive effect. Rather, the *Atlantic Salmon* panel found it sufficient that the USITC had not attributed to dumped imports "effects entirely caused by 'other factors'"[255] In keeping with that decision, the USITC's findings here make clear that, taking into account the partial price suppressive effect of the GM strike, nevertheless dumped imports caused significant price depression.

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[249] GM estimated that the total amount of flat rolled steel, including hot rolled, cold rolled, and corrosion resistant steels that was not purchased by it and its suppliers as a result of the strike-related work stoppages was about 685,000 tons. GM did not provide a figure limited to hot rolled steel only. USITC Views at 11. The USITC evaluated the relatively minor 685,000 tons (of which only a portion was hot rolled steel) in light of total apparent U.S. consumption of hot rolled steel, and which was 75,251,116 tons in 1998. *See* USITC Views at 16. *See also* USITC Views at IV-13, Table IV-9.

[250] The quarterly pricing data, in nearly all instances, demonstrated that the price of the imported and domestic product declined significantly in 1998. The USITC found that the price declines were most precipitous in the third and fourth quarters of 1998, at a time when the volume of dumped imports was peaking. USITC Views at 14.

[251] USITC Views at Table C-I.

[252] USITC Views at 16.

[253] The USITC found that U.S. apparent consumption was strong during the period of investigation, and appeared to be at a record high in 1998. USITC Views at 10.

[254] USITC Views at 16.

[255] *US-Atlantic Salmon* at 557.

120. In blatant disregard for the content of the USITC's determination, Japan alleges that the agency made "no effort to distinguish the effects of the General Motors strike from the effects of the subject imports."[256] The USITC decision demonstrates that the Commissioners examined the performance of the industry in the face of increasing apparent consumption and a substantially increasing volume of dumped imports.[257] The USITC observed that prices declined significantly in the second half of 1998, when dumped imports reached their highest levels. The USITC therefore found, consistent with its obligations under the Anti-Dumping Agreement, that there was a causal relationship between the significant price declines at a time of record U.S. consumption and the rapid increase of dumped imports of hot rolled steel, which were fairly substitutable with the domestic like product. Consequently, the USITC appropriately found that the dumped imports had significant price depressing effects on the domestic product.

### b. Minimill competition

121. The USITC also explicitly considered and rejected respondents' argument that the domestic industry's poor performance in 1998 was not causally related to the dumped imports but rather was a reflection of increased competition within the industry. The USITC acknowledged that a condition of competition pertinent to the hot rolled steel industry was the fact that the domestic industry consists of both integrated (or "BOF") producers and minimill (or "EAF") producers.[258] Consistent with the obligations under the Anti-Dumping Agreement, the USITC evaluated the increased competition between integrated and minimill producers as a

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[256] First Submission of Japan at 85, para. 277. The USITC's objective examination of the effects of the GM strike discredits Japan's repeated allegations of bias and political motivation. In separate steel investigations, which concerned an industry more sensitive to the consequences of the GM strike, the USITC relied on the effects of that strike in making a negative determination as to material injury by reason of dumped imports. *Certain Cold Rolled Steel Products From Argentina, Brazil, Japan, Russia, South Africa, and Thailand*, Inv. Nos. 701-TA-393 & 731-TA-829-30, 833-34, 836, & 838 (Final), USITC Pub. 3283 (March 2000) (**Exh. US/C-19**). In those investigations, the GM strike had added importance in that approximately 80 percent of overall GM purchases are of cold rolled and corrosion-resistant steel (as opposed to hot rolled). *Id.* at 23. The USITC noted in that investigation that the majority of responding cold rolled domestic producers and importers reported that the strike had a significant effect on the market, and that the timing of the GM work stoppage corresponded more closely with the drop in domestic prices than does the largest increase in dumped imports. Based on the different facts in those investigations, the USITC found that the contribution of dumped imports to price declines was minimal. *Id.* at 24. The USITC addressed the effects of the GM strike based on an objective examination of the evidence in each investigation it conducted.

[257] USITC Views at 20.

[258] USITC Views at 11.

relevant economic factor, and ensured through its analysis that any injurious effect due to this factor was not attributed to the dumped Japanese imports.[259] The USITC specifically addressed the price effects of the increased competition in the domestic industry consistent with the obligation under the Anti-dumping Agreement not to attribute any injury caused by such competition to the dumped imports. The USITC noted that minimills have lower costs and higher productivity rates than the integrated mills, and that this competitive advantage to some degree constrained the prices the integrated mills could command for their hot rolled steel.[260]

122. However, the USITC reasonably concluded that minimill competition could not have caused the adverse effects observed in the U.S. hot rolled steel industry. The evidence collected over the three year period of investigation suggested that the dumped imports depressed both BOF and EAF prices. Both BOF and EAF producers' prices declined significantly during the period of investigation, as reflected in unit values of shipments and sales.[261] The USITC noted that it was significant that the hot rolled steel prices for an established and efficient minimill producer declined significantly during the latter part of 1998 as dumped import volumes increased at their fastest rate. Furthermore, this producer's prices recovered only as dumped imports exited the market.[262]

123. The USITC noted that the same trends for the industry as a whole, including declines in operating income and the ratio of operating income to net sales, were also apparent in the separate results of both integrated mills and minimills.[263] However, EAF producers, who, lacking substantial captive production, are more sensitive to competition from imports,[264] had

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[259] *See similarly, U.S. - Atlantic Salmon* at paras. 559-560, stating that the USITC had not failed to conduct an examination of other known factors sufficient to ensure that it did not attribute to the dumped imports injury caused by other known factors. A potential other cause of material injury in that investigation involved "internal industry problems," and the USITC discussed the fact that the industry's most recent financial performance was worse than would have been anticipated, even taking into account start-up conditions.

[260] USITC Views at 15.

[261] USITC Views at 15.

[262] USITC Views at 15.

[263] USITC Views at 19.

[264] In comparison to BOF producers, EAF producers are generally more sensitive to competition in the merchant market because more of their production is sold in the spot market, their captive operations are generally not as substantial, and they generally maintain a lower proportion of long term contracts. USITC Views at 11. The
(continued...)

worse financial performance than BOF producers from 1997 to 1998.[265] For merchant market sales, EAF producers had lower operating income to net sales ratios than BOF producers. Accordingly, as EAF producers are more sensitive to the effects of imports, and, as they demonstrated lower operating income to net sales ratios than BOF producers at a period of dramatically increasing dumped imports, the USITC concluded that there was a causal relationship between the increased dumped imports and the domestic industry's injury. As the EAF producers were more sensitive to the effects of imports, and as their operating results did in fact more clearly reflect injury in 1998 when imports were increasing at a significant rate, the USITC found that operating results for the industry as a whole reflected a causal relationship between the dumped imports and the condition of the domestic industry.

124. Furthermore, the USITC reasonably concluded that domestic competition could not explain the industry declines at the end of the period investigated, at a time of record demand. The USITC specifically rejected the respondents' argument that the domestic industry's poor performance in 1998 was due to increased competition and not the effect of increased dumped imports.[266] The USITC observed that minimill competition was an important condition of competition in 1997, yet the condition of the domestic industry had deteriorated from the relatively successful performance that year.

125. The conditions of competition between integrated producers and minimills were generally similar in 1998, and the domestic industry manifested several economic indicators of material injury. In particular, the USITC observed that minimills substantially increased their capacity from 1996 to 1997, but that there was only an incremental increase in minimill capacity from 1997 to 1998. As the domestic industry's injury was most evident in 1998, it was therefore reasonable to conclude that dramatic increase in the volume of dumped imports, and not the increased capacity, were causally related to the injury to the domestic hot rolled steel industry. [267]
126. Japan attempts to discredit this finding by reiterating arguments made by Japanese

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[264] (...continued)
EAF producers are more dependent on the merchant market, where imports are concentrated. *Id.* at 19.

[265] USITC Views at 19.

[266] USITC Views at 18, 19.

[267] USITC Views at 19. Most of the increase in minimill "low cost" capacity occurred from 1996 to 1997, rather than from 1997 to 1998. EAF producers increased their capacity for each year over the period of investigation. BOF producers also increased their capacity for each year over the period of investigation. The USITC noted that although the increase in capacity for EAF producers was greater than for BOF producers from 1996 to 1997, that this trend reversed itself from 1997 to 1998. *Id.* at n.104.

respondents before the USITC that there would be a delay between the addition of capacity and increases in output by minimills.[268] This assertion by the Japanese respondents, however, was not borne out by the evidence. The USITC examined the data presented by the industry, and found that the minimill's capacity utilization rose between 1996 and 1997, the time when the capacity was added, and decreased again in 1998, the time when Japan asserts production levels should have been the highest.[269] Moreover, the USITC found that net sales for minimills decreased from 1997 to 1998,[270] when Japan claims that their output was the greatest.

127. In other words, in the beginning of the period of investigation there was a substantial increase in minimill capacity but no corresponding injury to the domestic industry. In the latter part of the period of investigation, there was a small increase in minimill capacity and signs of significant injury to the domestic industry; there was a significant increase in the volume of dumped imports at this time. Therefore, it was reasonable for the USITC to conclude that the injury evident in 1998 was due to the dumped imports and not increased competition as seen in the minor increase in capacity.

### c. Nonsubject imports

128. Contrary to Japan's assertions, the USITC conducted an examination of the effects of nonsubject imports that, in keeping with Article 3.5, assured that, in its analysis of the effects of dumped imports, it did not attribute to those imports injury due to imports not sold at dumped prices.

129. The USITC made specific findings concerning the role of nonsubject imports that ensured that any potential negative effects of this factor were not attributed to the dumped Japanese imports of hot rolled steel. Specifically, the USITC indicated that imports from non-subject countries maintained a stable presence in the U.S. market throughout the period of investigation.[271] When measured against total U.S. consumption, the market share of nonsubject imports was 5.7 percent in 1996, 5.0 percent in 1997, and 5.9 percent in 1998.[272] In contrast,

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[268] First Submission of Japan at para. 274.

[269] USITC Views at 17, n.104.

[270] USITC Views at n.106.

[271] USITC Views at 10.

[272] USITC Views at 10.

subject imports increased during the three year period of investigation.[273]

130. This analysis assured that, in analyzing the effects of dumped imports, the USITC did not falsely attribute to them effects that were in fact due to nonsubject imports. The USITC found that the dumped imports suppressed U.S. prices not only because they increasingly undersold U.S. product,[274] but also because of their rapid increase.[275] The USITC found this rapid increase of fairly substitutable dumped imports to be the key factor explaining why prices declined significantly at a time of record U.S. consumption. The USITC's findings make clear that nonsubject imports could not explain this striking phenomenon.

131. Despite the fact that the USITC determination includes the above explicit findings, the Japanese make the allegation that the "USITC completely ignored the impact of nonsubject imports."[276] The USITC's findings, however, demonstrated that the nonsubject imports cannot be said to have had any significant negative impact on the U.S. industry. There was thus no injury potentially caused by the nonsubject imports that the USITC could have improperly attributed to the dumped Japanese imports. Accordingly, the analysis conducted by the USITC of nonsubject imports was fully consistent with the obligation of the United States under the Agreement.

### d. Pipe and tube demand

132. Japan also erroneously argues that the USITC was specifically required to include a finding concerning a decrease in demand in the pipe and tube subsection of the hot rolled steel industry, and failure to provide an explanation as to this allegation was a violation of the Anti-Dumping Agreement.[277] It states that a faltering demand for pipe and tube products was an

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[273] USITC Views at 10. When measured by total U.S. consumption, the market share of subject imports was 2.0 percent in 1996, 4.2 percent in 1997, and 9.3 percent in 1998. *Id.* at n.49.

[274] USITC Views at 15.

[275] USITC Views at 16.

[276] First Submission of Japan at para. 281.

[277] First Submission of Japan at para. 271. As will be shown, the USITC addressed Japan's concerns. Nevertheless, the United States is compelled to observe that Japan's allegations on this matter are not properly before the panel. The requirements relevant to explanation of determinations are found in Article 12. Specifically, Article 12.2 requires that final determinations shall set forth in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. In its request for a panel the

(continued...)

alternative source of injury that was "ignored or slighted" by the USITC.[278] The USITC did, however, consider demand as a relevant economic factor having a bearing on the state of the industry.[279] It did so by examining aggregate demand for the domestic product, and found that demand for the industry as a whole increased every year over the period of investigation. This examination was relevant to the factors enumerated in Article 3.4 such as market share, production, and capacity utilization. The evidence demonstrated that U.S. apparent consumption of hot rolled steel increased from 1996 to 1997, and from 1997 to 1998.[280]

133. Thus, despite a fluctuation in one subsection of the industry, the USITC found that aggregate demand was strong during the period of investigation, increasing every year, and, indeed, appeared to have been at a record high in 1998.[281] The USITC found that imports injured the U.S. industry by preventing it from participating in the growth in demand despite the industry's capacity to do so. In this context, it is apparent why the USITC would regard a decrease in one source of demand as immaterial.

134. Given these findings, the USITC cannot be regarded as having attributed to the dumped imports the adverse effects of a decline in demand for pipe and tube. Indeed, in view of rising overall demand, it is difficult to see how falling demand from one set of customers can be regarded as a factor that is injuring the domestic industry within the meaning of Article 3.5 at all. The USITC determination does not in any way even allude to a conclusion that the adverse effects of a decrease in demand in a subsection of the U.S. market was attributable to the dumped imports, nor does Japan allege that it does so. The USITC found that the domestic industry's performance was substantially poorer than what would have been expected given the record level of demand for hot rolled steel.[282] The USITC's determination satisfies Article 3.5 by demonstrating the causal relationship between the substantially increased volume of dumped

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[277] (...continued)
Government of Japan did not allege that the United States was acting in a manner inconsistent with Article 12 of the Anti-Dumping Agreement. As Japan's panel request did not cite Article 12, any argument concerning the inadequacy of the determination for failure to make findings on a particular subject are beyond the terms of reference of this panel under Article 7:2 of the DSU.

[278] First Submission of Japan at para. 271.

[279] Article 3.4 of the Anti-Dumping Agreement.

[280] USITC Views at 10.

[281] USITC Views at 10 and n.49.

[282] USITC Views at 20.

imports at declining prices and material injury to the domestic industry, without attributing to those imports injury due to other causes.[283]

135. The USITC found a causal relationship between the substantially increased volume of dumped imports at declining prices and the U.S. industry's deteriorated performance, as reflected in nearly all economic indicators. In establishing the causal relationship between the dumped imports and the material injury to the domestic industry, the USITC considered all relevant economic factors and did not attribute to the dumped imports the effects of other known factors. Its decision fully complies with the requirements of Article 3 of the Anti-Dumping Agreement.

[283] USITC Views at 21. *See also, United States -- Atlantic Salmon* at para. 547 stating that the USITC had not "disregarded" possible other causes of injury when it expressly recognized that some other factors may have adversely affected the domestic industry but that this did not detract from the fact that material injury was also caused by the dumped imports. The Panel further stated that the USITC was required not to attribute injuries caused by other factors to the dumped imports, but not that it was obligated to identify the extent of injury caused by these factors in order to isolate the injury caused by these factors from the injury caused by the dumped imports. *Id.* at para. 555.

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**Part D**

## PART D: OTHER ISSUES AND CONCLUSION

### I. Japan's Claims under Article X:3 of the GATT 1994 Are Unfounded

#### A. The Actions at Issue Are Consistent With the Anti-Dumping Agreement and Do Not Violate Article X:3

1. Having failed to demonstrate that the U.S. law and the application of that law are contrary to the Anti-Dumping Agreement, Japan is trying to get a second "bite at the apple" by turning to Article X:3 of the GATT 1994. Japan is apparently alleging that this Panel should find that, even if the contested decisions were consistent with the Anti-Dumping Agreement, they might violate the Article X:3 requirement that certain laws, regulations, judicial decisions and administrative rulings of general application be administered in a uniform, impartial, and reasonable manner (which Japan terms "due process").

2. In considering the application of Article X:3 to this case, the Panel should note three things. First, Article X:3 is limited to the administration of certain laws, regulations, judicial decisions and administrative rulings of general application, not to the laws, regulations and administrative rulings themselves. Therefore, to the extent that Japan is complaining about laws, regulations and rulings of general application, as contrasted with their administration, its complaint is not properly founded in Article X:3. As the Appellate Body said in *Bananas:*

> The text of Article X:3(a) clearly indicates that the requirements of "uniformity, impartiality and reasonableness" do not apply to the laws, regulations, decisions and rulings *themselves*, but rather to the *administration* of those laws, regulations, decisions and rulings. The context of Article X:3(a) within Article X, which is entitled "Publication and Administration of Trade Regulations", and a reading of the other paragraphs of Article X, make it clear that Article X applies to the *administration* of laws, regulations, decisions and rulings. To the extent that the laws, regulations, decisions and rulings themselves are discriminatory, they can be examined for their consistency with the relevant provisions of the GATT 1994.[1]

3. Second, Article X is a general provision of the GATT 1994, which covers the "Publication and Administration of Trade Regulations". The Anti-Dumping Agreement, by contrast, lays out numerous specific rules on the conduct of anti-dumping investigations, and thoroughly addresses not only the substantive requirements of anti-dumping investigations, but procedural, or "due process" requirements as well. Under the general interpretive note to Annex 1A of the Marakesh Agreement, if there is a conflict between the Article X:3 and provisions of the Anti-dumping Agreement, the provisions of the Anti-dumping Agreement apply to the extent of the conflict.

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[1] *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, Report of the Appellate Body, 9 September, 1997 (hereinafter "*Bananas*"), at para. 200 (emphasis in original).

4. The Anti-dumping Agreement specifies in Article 1 that "an anti-dumping measure shall be applied . . . only pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement." Indeed, Anti-dumping Agreement Article 1 reflects that, regardless of the extent to which the administration of anti-dumping measures might be subject to the general strictures of Article X:3, the Anti-dumping Agreement itself was intended to govern specific actions taken under domestic laws.[2] The Anti-Dumping Agreement itself provides for procedural requirements applicable to the imposition of anti-dumping measures. Article 6 provides exporters opportunities to defend their interests, and Article 12 requires public notice and explanation of determinations. Further, under Article 17.6 a panel may review whether an investigating authority has properly established and objectively evaluated the facts, and interpreted relevant provisions of the Anti-Dumping Agreement reasonably. These provisions show that the Anti-Dumping Agreement was intended to address the policies expressed in Article X:3 with respect to specific actions taken under the Agreement.

5. It is plain that the arguments in Japan's first submission ignore the proper role of Article X:3 in this dispute. The Anti-Dumping Agreement authorizes the actions complained of in this dispute. Japan cannot meet its burden of demonstrating that these actions are not uniform, impartial and reasonable if they are authorized by, and applied consistently with, the Anti-Dumping Agreement. The Anti-Dumping Agreement negotiators would not have gone to the trouble of negotiating detailed rules governing anti-dumping investigations, if they thought those rules could be disregarded.

6. Introducing its Article X:3 claim, Japan explains that

> The U.S. Government essentially decided the case in the favor of the domestic industry before it even began its investigation. This bias surfaced repeatedly when the U.S. Government manipulated the facts and adopted impermissible legal interpretations.[3]

Plainly, whether the U.S. Government manipulated facts and adopted impermissible legal interpretations is decided under Article 17.6 of the Anti-Dumping Agreement, which provides that the Panel should (i) determine whether the establishment of the facts was proper and their evaluation unbiased and objective; and (ii) uphold the authorities actions if they are based on a permissible interpretation of the Anti-Dumping Agreement. It defies logic and law to assert that a Panel might find that an interpretation of the Agreement was permissible under Article 17.6(ii),

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[2] Article 1 of the Anti-dumping Agreement provides that "The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations."

[3] First Submission of Japan at para. 294.

but impermissible and biased under Article X:3. Article X:3 cannot be used to undercut the specific disciplines agreed upon in the Anti-Dumping Agreement.

7. As another obvious example, Japan asserts several times that the Department's selection of "facts available" was a "disproportionate penalty", thereby contravening the Article X:3(a) requirement that the administration of laws be "reasonable".[4] As demonstrated above, the Department's use of "facts available" -- including the choice of appropriate facts -- was entirely appropriate and consistent with the very specific and detailed "facts available" requirements set out in the Anti-Dumping Agreement. The Article X:3(a) "reasonableness" requirement cannot be interpreted to prevent what the Anti-Dumping Agreement specifically allows.

8. In addition, in considering Article X:3(a), the Panel should keep in mind that a "uniform, impartial and reasonable" system is not necessarily one in which each decision looks like the one before. As discussed in the previous sections, administering authorities must have the flexibility, in making its decisions and formulating its policies, to respond to different or evolving factual circumstances. Indeed, the Anti-Dumping Agreement specifically recognizes that many determinations will be decided on the particular circumstances presented. For example, Article 3.4 specifically eschews the proposition that any one particular criterion will control injury determinations. It states that "the examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry" and proceeds to list examples of such factors and indices. The last sentence of the article repeats that "[t]his list is not exhaustive" and adds, "nor can one or several of these factors necessarily give decisive guidance." Article 3.4 not only refrains from telling investigating authorities *how* to evaluate the various relevant factors, it also rejects the notion of applying a particular benchmark linked to any one of the factors. In doing so, it rejects the notion of "uniformity" that Japan seeks to impose on decision-making by its comparisons between the results in this investigation and the results in other investigations.

9. In addition, the Panel should distinguish this dispute – in which Japan is complaining about specific decisions made in the context of particular facts under the Anti-Dumping Agreement – from other Article X:3(a) disputes, in which the overall administration of some program was alleged to be arbitrary. For example, the allegation addressed under Article X:3 by the Appellate Body in *United States - Import Prohibition of Certain Shrimp and Shrimp Products* [5] was that the entire procedure under review was "non-transparent and ex-parte," that there was no formal notice of or reasons provided for actions, and that there was no opportunity for review of or appeal from an action.

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[4] *Id.*, at para. 316.

[5] *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Report of the Appellate Body, 12 October, 1998 (hereinafter "*Shrimp*"), at para. 188.

10. Such cases, in which the allegation is one of overall arbitrary application addressed by Article X:3 are very different from the purpose for which Japan uses Article X:3 in the present case. Japan has not alleged that the overall procedure of the anti-dumping law of the United States is applied arbitrarily, or that Members are otherwise deprived of basic due process, such as notice and opportunity for review in anti-dumping proceedings. Rather, it disagrees with the specific results in this proceeding.

11. Thus, for each of the issues raised by Japan, which are discussed in sections B and C above, the Panel should apply the Anti-Dumping Agreement before considering whether, in light of the provisions of the Anti-Dumping Agreement, there is any violation of Article X:3(a). The United States submits that, for the reasons outlined below, there is no such violation.

## B. The United States' Actions Were Consistent with GATT Article X:3

12. The United States' actions were consistent with GATT Article X:3, because, as the United States established in Parts B and C of this submission – regarding the determinations of the U.S. Commerce Department and the U.S. International Trade Commission, respectively – they were authorized by and implemented consistently with the pertinent, substantive provisions of the Anti-Dumping Agreement. The repetitious nature of much of Japan's first submission regarding its alleged due process claims[6] bears out the point, established above, that Article X:3 cannot be used as a method to circumvent proper review under the pertinent WTO agreement.

13. With regard to Japan's first Article X:3 claim that Commerce unfairly accelerated this proceeding,[7] the United States has explained in the introductory section in Part A above, and has elaborated upon with regard to critical circumstances in Part B above, that the extraordinary circumstances of this period, involving an unprecedented surge of imports resulting from the Asian financial crisis, fully justified the acceleration under both U.S. domestic law and the AD Agreement. It does not matter what the Department did in 70 out of 76 subsequent cases, as Japan seems to believe, or what it did with regard to questionnaires in all other cases in 1998.[8] What matters is what the Department did in this case, and the reasons for it. That is the issue for the Panel to review, under the pertinent provisions of the Anti-Dumping Agreement.

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[6] First Submission of Japan at 91-100.

[7] First Submission of Japan at 91-93, point 1.

[8] First Submission of Japan at 91-92, notes 286 and 291. With regard to questionnaires, Japan does not make the claim, and cannot, that any of its three responding mills were deprived of the requisite amount of time allowed under U.S. domestic law and the Agreement for responding to questionnaires. Indeed, they received extensions of time in numerous instances, as explained in both Parts A and B above.

14. Next, Japan claims that the Department acted in a biased manner in not applying to NKK its normal practice of correcting significant errors in preliminary determinations, shortly after those determinations are issued.[9] While Japan is correct in its recitation of the facts concerning Commerce's failure timely to correct the error – a correction not required under any provision of the Anti-Dumping Agreement[10] – Commerce did make the correction in its final determination. Indeed, as we explained in the introductory section of Part A above and as Japan itself points out, Commerce not only corrected the error, but did so retroactively to thirty days following NKK's original allegation of the error.[11] Commerce's oversight in this matter was nothing more than that: an oversight subsequently corrected. It was hardly an act of bias against Japan.

15. Japan's third bias contention regarding Commerce's critical circumstances determination[12] is completely rebutted in the pertinent discussion above, as well as in the introductory section above, and needs no further discussion here.

16. With regard to the application of facts available in this case, Japan attempts, in its fourth bias count, to claim a pattern of disparate treatment between Commerce and the USITC, as to respondents and petitioners, which allegedly constitutes bias.[13] There is no such pattern. With regard to the Commerce Department, each application of facts available to NSC, NKK, and KSC is fully justified on the individual, specific facts, as explained in detail in Part B above, and is consistent with the Agreement. To the extent that Japan is challenging the Commission's alleged use of facts available, it failed to include such a claim in its panel request, and thus the matter is outside this Panel's terms of reference, for the reasons explained in the preliminary objections section of Part A, above.

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[9] First Submission of Japan at 93-94, point 2.

[10] *See* Part A, Introduction, above. Moreover, Japan's complaint regarding this matter arises under U.S. law, not under the Agreement. The task of a panel is to review the consistency of a member's actions with the Agreement and not with that member's domestic laws, regulations or practices. Under Article 3.2 of the DSU, the purpose of the dispute settlement system of the WTO is to: "preserve the rights and obligations of members under the covered agreements, and to clarify the existing provisions of those agreements. . . ." Further, Article 7.2 of the DSU requires panels to "address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute." Finally, Article 3.7 of the DSU provides that ". . .the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements." Thus, the clear focus of the dispute settlement system is consistency of an action with a covered agreement.

[11] First Submission of Japan at 94, paras. 302-304, n. 209.

[12] First Submission of Japan at 95-96, point 3.

[13] First Submission of Japan at 96-99, point 4.

17. In any event, Japan's contrast between the Department's proceedings and the USITC's, in which domestic producers were asked to provide information after the USITC completed its hearing, cannot provide any basis for an allegation of bias. What Japan fails to recognize is that, in the investigations at issue here, both agencies merely followed their routine procedures for data collection. Japan's contention ignores the fundamental differences between the way that the two authorities conduct their investigations in every case. The differences between the willingness of the two agencies to accept late-filed information spring, not from any difference in attitude toward the information providers, but from systematic differences in the procedures that the authorities have developed for making the different types of decisions they are called upon to make.

18. It was by no means extraordinary for the USITC Commissioners to request at the USITC's hearing information that prior efforts had been unable to obtain. At the USITC, Commissioners participate in the information-gathering process by taking part in a hearing following the receipt of questionnaire responses and prehearing briefs from the parties. Under its rules, the USITC may obtain "relevant and material facts with respect to the subject matter of the investigation" during the hearing.[14] The Commission's rules provide that participants in the hearing may also file written answers to questions or requests made at the hearing.[15] It is thus routine for Commissioners to request information from parties -- both those favoring and those opposing an anti-dumping petition -- beyond what questionnaires have yielded.

19. In contrast, the data collection process of the Department of Commerce is geared toward having full information disclosure before the staff travel to the respondent companies for on-site verification of their data.[16] Parties may submit any information they believe to be relevant, in addition to all of the information specifically requested in the Department's questionnaires, prior to this date. After this date, information gathering generally is complete. The Department has the authority to request information after this date; however, such requests are not a part of the Department's normal data collection process. Although the Department may also hold a hearing, such a hearing is held after verification and is solely for the purpose of presentation of legal arguments, rather than for introduction of factual information.[17]

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[14] 19 C.F.R. § 201.13(g).

[15] 19 C.F.R. § 207.25.

[16] *See* 19 C.F.R. § 351.301(b)(1) which generally sets the deadline for submission of factual information in an investigation seven days before the date on which on-site verification is scheduled to commence.

[17] *See* 19 C.F.R. § 351.301(c) which provides that during a hearing "an interested party may make an affirmative presentation only on *arguments* included in that party's case brief and may make a rebuttal presentation only on *arguments* included in that party's rebuttal brief." (Emphasis added.)

20. These differences in process reflect fundamental differences in the nature of the facts into which the two authorities are inquiring. As Article 2 of the Anti-Dumping Agreement demonstrates, the dumping calculation is largely an inquiry focusing on the sales prices and, where necessary, costs of specific, foreign firms. An authority in making the relevant determination is making detailed findings concerning what is often hundreds or even thousands of specific transactions by particular firms, which are usually located overseas. Thus, for purposes of the requirement of Article 6.6, that authorities "during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based," Commerce relies primarily on the on-site verification of records of specific transactions by qualified professional staff, in keeping with Article 6.7. Correspondingly, the timely provision of information regarding each company's transactions subject to investigation becomes of the utmost importance.

21. While the USITC, the U.S. authority concerned with injury determinations, also is concerned with obtaining timely and accurate responses, the nature of its investigation leads to a different approach, because of its focus on aggregate effects on the industry. It is also concerned with assuring that, pursuant to Article 3.4, it has evaluated "all relevant economic factors and indices having a bearing on the state of the industry." Whereas the Department's consideration of each price or cost factor leads to an adjustment in its dumping margin calculation, the Commission's determination is not controlled by its findings as to each particular factor. As Article 3.4 provides, not "one or several of these factors necessarily gives decisive guidance." Moreover, as Japan has pointed out, the injury determination is concerned, not with transactions by individual companies, but rather with the effect of all dumped imports on the domestic producers as a whole, pursuant to Article 3.1 and Article 4. Consequently, the USITC's hearing helps assure thorough examination of the parties' views of the relevant economic factors and the weight to be accorded to each factor. The ability of the Commissioners to have the questions that they ask at the hearing answered allows them to assure that they have comprehensive information with which to evaluate the various asserted factors.

22. Thus, the USTIC is engaged in a very different endeavor than that engaged in by Commerce, and their respective data gathering processes reflect these differences. The Department is engaged in a calculation. The accuracy of each piece of data is fundamental to ensuring that the ultimate margin of dumping calculated is as accurate as possible. By contrast, the USTIC is engaged in a process of balancing a large amount of potentially contradictory data in which no one piece of data is determinative of the outcome.

23. These differences are also reflected in the different ways that the two authorities use "facts available", as provided for in Article 6.8. The United States Congress recognized these systematic differences in enacting implementing legislation following the Uruguay Round. Specifically, the Statement of Administrative Action to the Uruguay Round Agreements Act

states as follows:

> Commerce and the Commission use the facts available in different ways. In general, the Commission makes determinations by weighing all of the available evidence regarding a multiplicity of factors relating to the domestic industry as a whole and by drawing reasonable inferences from the evidence it finds most persuasive. Therefore, new section 776(a) generally will require the Commission to reach a determination by making such inferences as the evidence of record supports even if that evidence is less than complete. In contrast, Commerce generally makes determinations regarding specific companies, based primarily on the information obtained directly from those companies. Section 776(a) generally will require Commerce to reach a determination of filling gaps in the record due to deficient submission or other causes.[18]

24. As this Statement describes, and as was discussed above, the Department uses facts available, both adverse and non-adverse, in filling gaps necessary to make the calculations necessary to deriving dumping margins. In contrast, the USITC does not similarly "fill gaps." It almost never takes adverse inferences, against any party. This is both because its findings amalgamate data from numerous firms, some responsive and others not, and because, even if it could take an adverse inferences as to evidence concerning one relevant factor, such an inference would not inform it as to how weigh that factor against the evidence of other factors.

25. In short, that the Department took an adverse inference when data was not timely provided and that the Commission asked for and received information after its hearing data that had not been previously provided does not reflect any bias. Rather, it reflects systematic differences in the ways the authorities, consistent with the Anti-Dumping Agreement, conduct their investigation. Indeed, in their comments to the USITC on the data that domestic producers submitted in response to the Commission's request,[19] Japanese respondents did not advise the Commission that the Department had rejected a submission in circumstances that they regarded as similar. There is no basis for ascribing to the Commission any improper motive in the conduct of its proceedings.

26. In fact, far from indicating any prejudgment of the case, the Commissioners' request for additional data on domestic producers' captive production shows that they had an open mind and were determined to obtain the most complete picture possible of effects on the industry. It shows that they were deeply concerned with knowing as much as possible about operations that the Japanese respondents regarded as critical to their position. Obtaining additional information

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[18] SAA at 869.

[19] Respondents' Comments on Final Release of Information, filed June 7, 1999

about petitioners' captive operations would be likely to assist, rather than prejudice, respondents, since captive operations are most insulated from the effects of imports. There is no merit whatsoever in Japan's bias claims.

27. Finally, there is also no merit, either legal or factual, in Japan's statement that the USITC did not give Japanese respondents an adequate opportunity to respond to the information that domestic producers provided in response to the Commissioners' questions. Going beyond the requirements of Article 6.9 of the Anti-Dumping Agreement, the USITC throughout its proceeding disclosed to interested parties all information under consideration and provided repeated opportunities for submissions by which they could defend their interests. To assure that interested parties also have time to defend their interests as to information presented in posthearing briefs, the USITC under its rule 19 C.F.R. § 207.30 (a), specifies a date before it finally closes the record on which it will disclose to all parties to the investigation all information it has obtained on which the parties have not previously had an opportunity to comment. Parties are then given an opportunity under 19 C.F.R. § 207.30 (b) to comment on any information they have received (including information in other parties' posthearing briefs) that they have received since they filed their posthearing briefs.

28. The Commission provided such an opportunity in this case. Consequently, Japanese respondents had an opportunity to respond to the domestic producers' submission. They did not contend that the time allowed was inadequate. Nor does Japan's panel request in this proceeding, although it alleges that the Department violated Article 6, allege that the USITC violated Article 6 in any respect, including the requirement of Article 6.9 concerning providing sufficient time for parties to defend their interests. Thus, Japan's statements that the USITC allowed domestic producers to provide information too late for Japanese interests to have an adequate opportunity to respond are merely rhetorical flourishes unsupported by the facts and beyond the claims that Japan has brought in this case.

29. Japan's final argument is that the USITC deviated from its prior practice and ignored the U.S. industry's financial performance early in the period. As demonstrated in Part C above, Japan's claim is untrue, and is based on a misrepresentation both of the USITC's practice and its determination in this investigation.

30. In conclusion, the Panel must disregard Japan's arguments that alleged inconsistencies by the United States, amounting to an alleged denial of due process, constitute a violation of Article X:3. Instead, the Panel must judge each of these issues on its facts, with regard to the specific Anti-Dumping Agreement provision invoked, and not be drawn into vague allegations of general bias under a section of the GATT

## II. The Specific Remedy Sought by Japan Is Inconsistent With Established Panel Practice and the DSU

31. In its first submission, Japan has asked this Panel to recommend that, if the Panel's findings result in a determination that the imported product was not dumped or did not cause injury, or that product was dumped to a lesser extent than the duties actually imposed, the DSB request that the United States revoke its anti-dumping duty order and reimburse anti-dumping duties collected.[20] In so doing, Japan has requested a specific remedy that is inconsistent with established GATT/WTO practice and the DSU. Therefore, should the Panel agree with Japan on the merits, the Panel nonetheless should reject the requested remedy, and instead should make a general recommendation, consistent with the DSU and established GATT/WTO practice, that the United States bring its anti-dumping measure into conformity with its obligations under the AD Agreement.

32. The specific remedy[21] of revocation requested by Japan goes far beyond the type of remedies recommended by the overwhelming preponderance of prior GATT 1947 and WTO panels. In virtually every case in which a panel has found a measure to be inconsistent with a GATT obligation, panels have issued the general recommendation that the country "bring its measures . . . into conformity with GATT."[22] This is true not only for GATT disputes, in general, but for disputes involving the imposition of anti-dumping (and countervailing duty) measures, in particular.[23]

33. This well-established practice is codified in Article 19.1 of the DSU, which provides:

> Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. (footnotes omitted).

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[20] First Submission of Japan at para. 325 (d) and (e).

[21] By "specific" remedy, the United States means a remedy that requires a party to take a particular, specific action in order to cure a WTO-inconsistency found by a panel.

[22] *See, e.g., Canada - Measures Affecting Exports of Unprocessed Herring and Salmon,* L/6268, Report of the Panel adopted 22 March 1988, BISD 35S/98, 115, para. 5.1. The United States will spare the Panel a lengthy citation of all other panel reports in which panels have made recommendations using similar language; the number of such reports is well in excess of 100.

[23] *See, e.g., Canadian Countervailing Duties on Grain Corn from the United States*, SCM/140 and Corr. 1, Report of the Panel adopted 28 April 1992, BISD 39S/411, 432, para. 6.2; *Korean Resins*, ADP/92, para. 302.

34. Indeed, in the first case to work its way through the WTO dispute settlement system, the recommendations of both the panel and the Appellate Body carefully adhered to Article 19.1.[24]

35. The requirement that panels make general recommendations reflects the purpose and role of dispute settlement in the WTO, and, before it, under GATT 1947. Article 3.4 of the DSU provides that "[r]ecommendations and rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter," and Article 3.7 provides that "[a] solution mutually acceptable to the parties to a dispute . . . is clearly to be preferred." To this end, Article 11 of the DSU directs panels to "consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution." Ideally, a mutually agreed solution will be achieved before a panel issues its report. However, if this does not occur, a general panel recommendation that directs a party to conform with its obligations still leaves parties with the necessary room to cooperate in arriving at a mutually agreed solution.[25]

36. Indeed, a Member generally has many options available to it to bring a measure into conformity with its WTO obligations. A panel cannot, and should not, prejudge by its recommendation the solution to be arrived at by the parties to the dispute after the DSB adopts the panel's report.

37. In addition, the requirement that panels issue general recommendations comports with the nature of a panel's expertise, which lies in the interpretation of covered agreements. Panels generally lack expertise in the domestic law of a defending party.[26] Thus, while it is appropriate

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[24] In *Reformulated Gasoline*, the Appellate Body recommended "that the Dispute Settlement Body request the United States to bring the baseline establishment rules contained in Part 80 of Title 40 of the Code of Federal Regulations into conformity with its obligations under the *General Agreement*." WT/DS2/AB/R, p. 29. The panel in that case issued a virtually identical recommendation. WT/DS2/R, Report of the Panel, as modified by the Appellate Body, adopted 20 May 1996, para 8.2.

Even more noteworthy is *Japan Taxes*, in which the Appellate Body recommended "that the Dispute Settlement Body request Japan to bring the Liquor Tax Law into conformity with its obligations under the General Agreement on Tariffs and Trade 1994." WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at 34.

[25] As noted by Prof. Jackson:

> One of the basic objectives of any dispute procedure in GATT has been the effective resolution of the dispute rather than "punishment" or imposing a "sanction" or obtaining "compensation." This objective has been recognized explicitly by GATT committees. The prime objective has been stated to be the "withdrawal" of a measure inconsistent with the General Agreement.

John H. Jackson, *World Trade and the Law of the GATT* 184 (1969) (citations omitted).

[26] Indeed, Article 8.3 of the DSU provides that citizens of Members whose governments are parties to a dispute normally shall not serve on a panel concerned with that dispute, absent agreement by the parties.

for a panel to determine in a particular case that a Member's legislation was applied in a manner inconsistent with that country's obligations under a WTO agreement, it is not appropriate for a panel to dictate which of the available options a party must take to bring its actions into conformity with its international obligations.

38. Japan's proposed remedy is particularly inappropriate in view of the arguments that it makes in this case. Although Japan contests certain aspects of the Department's dumping margin calculations, even if the Department were to calculate the margins as Japan prefers, it would still find Japanese imports to be sold at dumped prices. Likewise, as has been seen, Japan does not contend that the Commission could not reach an affirmative determination on the evidence before it, but rather that certain findings in one of the three USITC opinions reaching an affirmative determination were erroneous. Indeed, even if Japan were successful in its challenge to the United States statute's captive production provision, such a holding by the panel would not affect the decisions of a dispositive plurality of USITC Commissioners. Thus, even on Japan's own arguments, it would be possible for the United States authorities to reach revised determinations in response to an adverse panel decision that would not necessitate terminating the anti-dumping order. Especially in this case, it should be for the WTO Member and its investigating authorities to decide how to conform their measures to any adverse Panel findings.

39. The compliance process under the DSU makes the precise manner of implementation a matter to be determined in the first instance by the Member concerned, subject to limited rights to compensation or retaliation by parties that have successfully invoked the dispute settlement procedures. In Article 19 of the DSU, the drafters precluded a panel from prejudging the outcome of this process in their recommendations.

40. In sum, specific remedies are at odds with established GATT and WTO practice and the express terms of the DSU. Therefore, regardless of how the merits of this case are decided, Japan's request for specific remedies should be rejected.

## CONCLUSION

41. Based on the foregoing, the United States respectfully requests the Panel to find that:

- The information submitted to this Panel by Japan that was not made available to U.S. authorities during the course of the anti-dumping investigation at issue will be disregarded in this proceeding;

- Japan's claim concerning the United States's general practice with respect to "facts available"July 21, 2000 was not raised in Japan's request for the establishment of a panel and is therefore not included in this Panel's terms of reference;

- The specific anti-dumping measures imposed by the United States on hot-rolled steel from Japan are consistent with the provisions of the Anti-Dumping Agreement identified by Japan in its submission at para. 325 (a);

- None of the actions identified by Japan in its submission at para. 325 (b) was inconsistent with Article X:3 of the GATT 1994;

- The United States' anti-dumping laws, regulations, and administrative procedures governing the issues identified by Japan in its submission at para. 325 (c) are not inconsistent with the provisions of the Anti-Dumping Agreement identified in that paragraph.

- The specific remedies requested by Japan in its submission at para. 325 (d) and (e) are contrary to established practice and the DSU.

## PART D: OTHER ISSUES AND CONCLUSION

### I. Japan's Claims under Article X:3 of the GATT 1994 Are Unfounded

#### A. The Actions at Issue Are Consistent With the Anti-Dumping Agreement and Do Not Violate Article X:3

1. Having failed to demonstrate that the U.S. law and the application of that law are contrary to the Anti-Dumping Agreement, Japan is trying to get a second "bite at the apple" by turning to Article X:3 of the GATT 1994. Japan is apparently alleging that this Panel should find that, even if the contested decisions were consistent with the Anti-Dumping Agreement, they might violate the Article X:3 requirement that certain laws, regulations, judicial decisions and administrative rulings of general application be administered in a uniform, impartial, and reasonable manner (which Japan terms "due process").

2. In considering the application of Article X:3 to this case, the Panel should note three things. First, Article X:3 is limited to the administration of certain laws, regulations, judicial decisions and administrative rulings of general application, not to the laws, regulations and administrative rulings themselves. Therefore, to the extent that Japan is complaining about laws, regulations and rulings of general application, as contrasted with their administration, its complaint is not properly founded in Article X:3. As the Appellate Body said in *Bananas:*

> The text of Article X:3(a) clearly indicates that the requirements of "uniformity, impartiality and reasonableness" do not apply to the laws, regulations, decisions and rulings *themselves*, but rather to the *administration* of those laws, regulations, decisions and rulings. The context of Article X:3(a) within Article X, which is entitled "Publication and Administration of Trade Regulations", and a reading of the other paragraphs of Article X, make it clear that Article X applies to the *administration* of laws, regulations, decisions and rulings. To the extent that the laws, regulations, decisions and rulings themselves are discriminatory, they can be examined for their consistency with the relevant provisions of the GATT 1994.[1]

3. Second, Article X is a general provision of the GATT 1994, which covers the "Publication and Administration of Trade Regulations". The Anti-Dumping Agreement, by contrast, lays out numerous specific rules on the conduct of anti-dumping investigations, and thoroughly addresses not only the substantive requirements of anti-dumping investigations, but procedural, or "due process" requirements as well. Under the general interpretive note to Annex 1A of the Marakesh Agreement, if there is a conflict between the Article X:3 and provisions of

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[1] *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, Report of the Appellate Body, 9 September, 1997 (hereinafter "*Bananas*"), at para. 200 (emphasis in original).

the Anti-dumping Agreement, the provisions of the Anti-dumping Agreement apply to the extent of the conflict.

4. The Anti-dumping Agreement specifies in Article 1 that "an anti-dumping measure shall be applied . . . only pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement." Indeed, Anti-dumping Agreement Article 1 reflects that, regardless of the extent to which the administration of anti-dumping measures might be subject to the general strictures of Article X:3, the Anti-dumping Agreement itself was intended to govern specific actions taken under domestic laws.[2] The Anti-Dumping Agreement itself provides for procedural requirements applicable to the imposition of anti-dumping measures. Article 6 provides exporters opportunities to defend their interests, and Article 12 requires public notice and explanation of determinations. Further, under Article 17.6 a panel may review whether an investigating authority has properly established and objectively evaluated the facts, and interpreted relevant provisions of the Anti-Dumping Agreement reasonably. These provisions show that the Anti-Dumping Agreement was intended to address the policies expressed in Article X:3 with respect to specific actions taken under the Agreement.

5. It is plain that the arguments in Japan's first submission ignore the proper role of Article X:3 in this dispute. The Anti-Dumping Agreement authorizes the actions complained of in this dispute. Japan cannot meet its burden of demonstrating that these actions are not uniform, impartial and reasonable if they are authorized by, and applied consistently with, the Anti-Dumping Agreement. The Anti-Dumping Agreement negotiators would not have gone to the trouble of negotiating detailed rules governing anti-dumping investigations, if they thought those rules could be disregarded.

6. Introducing its Article X:3 claim, Japan explains that

> The U.S. Government essentially decided the case in the favor of the domestic industry before it even began its investigation. This bias surfaced repeatedly when the U.S. Government manipulated the facts and adopted impermissible legal interpretations.[3]

Plainly, whether the U.S. Government manipulated facts and adopted impermissible legal interpretations is decided under Article 17.6 of the Anti-Dumping Agreement, which provides

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[2] Article 1 of the Anti-dumping Agreement provides that "The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations."

[3] First Submission of Japan at para. 294.

that the Panel should (i) determine whether the establishment of the facts was proper and their evaluation unbiased and objective; and (ii) uphold the authorities actions if they are based on a permissible interpretation of the Anti-Dumping Agreement. It defies logic and law to assert that a Panel might find that an interpretation of the Agreement was permissible under Article 17.6(ii), but impermissible and biased under Article X:3. Article X:3 cannot be used to undercut the specific disciplines agreed upon in the Anti-Dumping Agreement.

7. As another obvious example, Japan asserts several times that the Department's selection of "facts available" was a "disproportionate penalty", thereby contravening the Article X:3(a) requirement that the administration of laws be "reasonable".[4] As demonstrated above, the Department's use of "facts available" -- including the choice of appropriate facts -- was entirely appropriate and consistent with the very specific and detailed "facts available" requirements set out in the Anti-Dumping Agreement. The Article X:3(a) "reasonableness" requirement cannot be interpreted to prevent what the Anti-Dumping Agreement specifically allows.

8. In addition, in considering Article X:3(a), the Panel should keep in mind that a "uniform, impartial and reasonable" system is not necessarily one in which each decision looks like the one before. As discussed in the previous sections, administering authorities must have the flexibility, in making its decisions and formulating its policies, to respond to different or evolving factual circumstances. Indeed, the Anti-Dumping Agreement specifically recognizes that many determinations will be decided on the particular circumstances presented. For example, Article 3.4 specifically eschews the proposition that any one particular criterion will control injury determinations. It states that "the examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry" and proceeds to list examples of such factors and indices. The last sentence of the article repeats that "[t]his list is not exhaustive" and adds, "nor can one or several of these factors necessarily give decisive guidance." Article 3.4 not only refrains from telling investigating authorities *how* to evaluate the various relevant factors, it also rejects the notion of applying a particular benchmark linked to any one of the factors. In doing so, it rejects the notion of "uniformity" that Japan seeks to impose on decision-making by its comparisons between the results in this investigation and the results in other investigations.

9. In addition, the Panel should distinguish this dispute – in which Japan is complaining about specific decisions made in the context of particular facts under the Anti-Dumping Agreement – from other Article X:3(a) disputes, in which the overall administration of some program was alleged to be arbitrary. For example, the allegation addressed under Article X:3 by the Appellate Body in *United States - Import Prohibition of Certain Shrimp and Shrimp*

[4] *Id.*, at para. 316.

*Products* [5] was that the entire procedure under review was "non-transparent and ex-parte," that there was no formal notice of or reasons provided for actions, and that there was no opportunity for review of or appeal from an action.

10. Such cases, in which the allegation is one of overall arbitrary application addressed by Article X:3 are very different from the purpose for which Japan uses Article X:3 in the present case. Japan has not alleged that the overall procedure of the anti-dumping law of the United States is applied arbitrarily, or that Members are otherwise deprived of basic due process, such as notice and opportunity for review in anti-dumping proceedings. Rather, it disagrees with the specific results in this proceeding.

11. Thus, for each of the issues raised by Japan, which are discussed in sections B and C above, the Panel should apply the Anti-Dumping Agreement before considering whether, in light of the provisions of the Anti-Dumping Agreement, there is any violation of Article X:3(a). The United States submits that, for the reasons outlined below, there is no such violation.

### B. The United States' Actions Were Consistent with GATT Article X:3

12. The United States' actions were consistent with GATT Article X:3, because, as the United States established in Parts B and C of this submission – regarding the determinations of the U.S. Commerce Department and the U.S. International Trade Commission, respectively – they were authorized by and implemented consistently with the pertinent, substantive provisions of the Anti-Dumping Agreement. The repetitious nature of much of Japan's first submission regarding its alleged due process claims[6] bears out the point, established above, that Article X:3 cannot be used as a method to circumvent proper review under the pertinent WTO agreement.

13. With regard to Japan's first Article X:3 claim that Commerce unfairly accelerated this proceeding,[7] the United States has explained in the introductory section in Part A above, and has elaborated upon with regard to critical circumstances in Part B above, that the extraordinary circumstances of this period, involving an unprecedented surge of imports resulting from the Asian financial crisis, fully justified the acceleration under both U.S. domestic law and the AD Agreement. It does not matter what the Department did in 70 out of 76 subsequent cases, as

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[5] *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Report of the Appellate Body, 12 October, 1998 (hereinafter "*Shrimp*"), at para. 188.

[6] First Submission of Japan at 91-100.

[7] First Submission of Japan at 91-93, point 1.

Japan seems to believe, or what it did with regard to questionnaires in all other cases in 1998.[8] What matters is what the Department did in this case, and the reasons for it. That is the issue for the Panel to review, under the pertinent provisions of the Anti-Dumping Agreement.

14. Next, Japan claims that the Department acted in a biased manner in not applying to NKK its normal practice of correcting significant errors in preliminary determinations, shortly after those determinations are issued.[9] While Japan is correct in its recitation of the facts concerning Commerce's failure timely to correct the error – a correction not required under any provision of the Anti-Dumping Agreement[10] – Commerce did make the correction in its final determination. Indeed, as we explained in the introductory section of Part A above and as Japan itself points out, Commerce not only corrected the error, but did so retroactively to thirty days following NKK's original allegation of the error.[11] Commerce's oversight in this matter was nothing more than that: an oversight subsequently corrected. It was hardly an act of bias against Japan.

15. Japan's third bias contention regarding Commerce's critical circumstances determination[12] is completely rebutted in the pertinent discussion above, as well as in the introductory section above, and needs no further discussion here.

16. With regard to the application of facts available in this case, Japan attempts, in its fourth

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[8] First Submission of Japan at 91-92, notes 286 and 291. With regard to questionnaires, Japan does not make the claim, and cannot, that any of its three responding mills were deprived of the requisite amount of time allowed under U.S. domestic law and the Agreement for responding to questionnaires. Indeed, they received extensions of time in numerous instances, as explained in both Parts A and B above.

[9] First Submission of Japan at 93-94, point 2.

[10] *See* Part A, Introduction, above. Moreover, Japan's complaint regarding this matter arises under U.S. law, not under the Agreement. The task of a panel is to review the consistency of a member's actions with the Agreement and not with that member's domestic laws, regulations or practices. Under Article 3.2 of the DSU, the purpose of the dispute settlement system of the WTO is to: "preserve the rights and obligations of members under the covered agreements, and to clarify the existing provisions of those agreements. . . ." Further, Article 7.2 of the DSU requires panels to "address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute." Finally, Article 3.7 of the DSU provides that ". . .the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements." Thus, the clear focus of the dispute settlement system is consistency of an action with a covered agreement.

[11] First Submission of Japan at 94, paras. 302-304, n. 209.

[12] First Submission of Japan at 95-96, point 3.

bias count, to claim a pattern of disparate treatment between Commerce and the USITC, as to respondents and petitioners, which allegedly constitutes bias.[13] There is no such pattern. With regard to the Commerce Department, each application of facts available to NSC, NKK, and KSC is fully justified on the individual, specific facts, as explained in detail in Part B above, and is consistent with the Agreement. To the extent that Japan is challenging the Commission's alleged use of facts available, it failed to include such a claim in its panel request, and thus the matter is outside this Panel's terms of reference, for the reasons explained in the preliminary objections section of Part A, above.

17. In any event, Japan's contrast between the Department's proceedings and the USITC's, in which domestic producers were asked to provide information after the USITC completed its hearing, cannot provide any basis for an allegation of bias. What Japan fails to recognize is that, in the investigations at issue here, both agencies merely followed their routine procedures for data collection. Japan's contention ignores the fundamental differences between the way that the two authorities conduct their investigations in every case. The differences between the willingness of the two agencies to accept late-filed information spring, not from any difference in attitude toward the information providers, but from systematic differences in the procedures that the authorities have developed for making the different types of decisions they are called upon to make.

18. It was by no means extraordinary for the USITC Commissioners to request at the USITC's hearing information that prior efforts had been unable to obtain. At the USITC, Commissioners participate in the information-gathering process by taking part in a hearing following the receipt of questionnaire responses and prehearing briefs from the parties. Under its rules, the USITC may obtain "relevant and material facts with respect to the subject matter of the investigation" during the hearing.[14] The Commission's rules provide that participants in the hearing may also file written answers to questions or requests made at the hearing.[15] It is thus routine for Commissioners to request information from parties -- both those favoring and those opposing an anti-dumping petition -- beyond what questionnaires have yielded.

19. In contrast, the data collection process of the Department of Commerce is geared toward having full information disclosure before the staff travel to the respondent companies for on-site

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[13] First Submission of Japan at 96-99, point 4.

[14] 19 C.F.R. § 201.13(g).

[15] 19 C.F.R. § 207.25.

verification of their data.[16] Parties may submit any information they believe to be relevant, in addition to all of the information specifically requested in the Department's questionnaires, prior to this date. After this date, information gathering generally is complete. The Department has the authority to request information after this date; however, such requests are not a part of the Department's normal data collection process. Although the Department may also hold a hearing, such a hearing is held after verification and is solely for the purpose of presentation of legal arguments, rather than for introduction of factual information.[17]

20. These differences in process reflect fundamental differences in the nature of the facts into which the two authorities are inquiring. As Article 2 of the Anti-Dumping Agreement demonstrates, the dumping calculation is largely an inquiry focusing on the sales prices and, where necessary, costs of specific, foreign firms. An authority in making the relevant determination is making detailed findings concerning what is often hundreds or even thousands of specific transactions by particular firms, which are usually located overseas. Thus, for purposes of the requirement of Article 6.6, that authorities "during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based," Commerce relies primarily on the on-site verification of records of specific transactions by qualified professional staff, in keeping with Article 6.7. Correspondingly, the timely provision of information regarding each company's transactions subject to investigation becomes of the utmost importance.

21. While the USITC, the U.S. authority concerned with injury determinations, also is concerned with obtaining timely and accurate responses, the nature of its investigation leads to a different approach, because of its focus on aggregate effects on the industry. It is also concerned with assuring that, pursuant to Article 3.4, it has evaluated "all relevant economic factors and indices having a bearing on the state of the industry." Whereas the Department's consideration of each price or cost factor leads to an adjustment in its dumping margin calculation, the Commission's determination is not controlled by its findings as to each particular factor. As Article 3.4 provides, not "one or several of these factors necessarily gives decisive guidance." Moreover, as Japan has pointed out, the injury determination is concerned, not with transactions by individual companies, but rather with the effect of all dumped imports on the domestic producers as a whole, pursuant to Article 3.1 and Article 4. Consequently, the USITC's hearing

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[16] *See* 19 C.F.R. § 351.301(b)(1) which generally sets the deadline for submission of factual information in an investigation seven days before the date on which on-site verification is scheduled to commence.

[17] *See* 19 C.F.R. § 351.301(c) which provides that during a hearing "an interested party may make an affirmative presentation only on *arguments* included in that party's case brief and may make a rebuttal presentation only on *arguments* included in that party's rebuttal brief." (Emphasis added.)

helps assure thorough examination of the parties' views of the relevant economic factors and the weight to be accorded to each factor. The ability of the Commissioners to have the questions that they ask at the hearing answered allows them to assure that they have comprehensive information with which to evaluate the various asserted factors.

22. Thus, the USTIC is engaged in a very different endeavor than that engaged in by Commerce, and their respective data gathering processes reflect these differences. The Department is engaged in a calculation. The accuracy of each piece of data is fundamental to ensuring that the ultimate margin of dumping calculated is as accurate as possible. By contrast, the USTIC is engaged in a process of balancing a large amount of potentially contradictory data in which no one piece of data is determinative of the outcome.

23. These differences are also reflected in the different ways that the two authorities use "facts available", as provided for in Article 6.8. The United States Congress recognized these systematic differences in enacting implementing legislation following the Uruguay Round. Specifically, the Statement of Administrative Action to the Uruguay Round Agreements Act states as follows:

> Commerce and the Commission use the facts available in different ways. In general, the Commission makes determinations by weighing all of the available evidence regarding a multiplicity of factors relating to the domestic industry as a whole and by drawing reasonable inferences from the evidence it finds most persuasive. Therefore, new section 776(a) generally will require the Commission to reach a determination by making such inferences as the evidence of record supports even if that evidence is less than complete. In contrast, Commerce generally makes determinations regarding specific companies, based primarily on the information obtained directly from those companies. Section 776(a) generally will require Commerce to reach a determination of filling gaps in the record due to deficient submission or other causes.[18]

24. As this Statement describes, and as was discussed above, the Department uses facts available, both adverse and non-adverse, in filling gaps necessary to make the calculations necessary to deriving dumping margins. In contrast, the USITC does not similarly "fill gaps." It almost never takes adverse inferences, against any party. This is both because its findings amalgamate data from numerous firms, some responsive and others not, and because, even if it could take an adverse inferences as to evidence concerning one relevant factor, such an inference would not inform it as to how weigh that factor against the evidence of other factors.

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[18] SAA at 869.

25. In short, that the Department took an adverse inference when data was not timely provided and that the Commission asked for and received information after its hearing data that had not been previously provided does not reflect any bias. Rather, it reflects systematic differences in the ways the authorities, consistent with the Anti-Dumping Agreement, conduct their investigation. Indeed, in their comments to the USITC on the data that domestic producers submitted in response to the Commission's request,[19] Japanese respondents did not advise the Commission that the Department had rejected a submission in circumstances that they regarded as similar. There is no basis for ascribing to the Commission any improper motive in the conduct of its proceedings.

26. In fact, far from indicating any prejudgment of the case, the Commissioners' request for additional data on domestic producers' captive production shows that they had an open mind and were determined to obtain the most complete picture possible of effects on the industry. It shows that they were deeply concerned with knowing as much as possible about operations that the Japanese respondents regarded as critical to their position. Obtaining additional information about petitioners' captive operations would be likely to assist, rather than prejudice, respondents, since captive operations are most insulated from the effects of imports. There is no merit whatsoever in Japan's bias claims.

27. Finally, there is also no merit, either legal or factual, in Japan's statement that the USITC did not give Japanese respondents an adequate opportunity to respond to the information that domestic producers provided in response to the Commissioners' questions. Going beyond the requirements of Article 6.9 of the Anti-Dumping Agreement, the USITC throughout its proceeding disclosed to interested parties all information under consideration and provided repeated opportunities for submissions by which they could defend their interests. To assure that interested parties also have time to defend their interests as to information presented in posthearing briefs, the USITC under its rule 19 C.F.R. § 207.30 (a), specifies a date before it finally closes the record on which it will disclose to all parties to the investigation all information it has obtained on which the parties have not previously had an opportunity to comment. Parties are then given an opportunity under 19 C.F.R. § 207.30 (b) to comment on any information they have received (including information in other parties' posthearing briefs) that they have received since they filed their posthearing briefs.

28. The Commission provided such an opportunity in this case. Consequently, Japanese respondents had an opportunity to respond to the domestic producers' submission. They did not contend that the time allowed was inadequate. Nor does Japan's panel request in this

[19] Respondents' Comments on Final Release of Information, filed June 7, 1999

proceeding, although it alleges that the Department violated Article 6, allege that the USITC violated Article 6 in any respect, including the requirement of Article 6.9 concerning providing sufficient time for parties to defend their interests. Thus, Japan's statements that the USITC allowed domestic producers to provide information too late for Japanese interests to have an adequate opportunity to respond are merely rhetorical flourishes unsupported by the facts and beyond the claims that Japan has brought in this case.

29. Japan's final argument is that the USITC deviated from its prior practice and ignored the U.S. industry's financial performance early in the period. As demonstrated in Part C above, Japan's claim is untrue, and is based on a misrepresentation both of the USITC's practice and its determination in this investigation.

30. In conclusion, the Panel must disregard Japan's arguments that alleged inconsistencies by the United States, amounting to an alleged denial of due process, constitute a violation of Article X:3. Instead, the Panel must judge each of these issues on its facts, with regard to the specific Anti-Dumping Agreement provision invoked, and not be drawn into vague allegations of general bias under a section of the GATT

## II. The Specific Remedy Sought by Japan Is Inconsistent With Established Panel Practice and the DSU

31. In its first submission, Japan has asked this Panel to recommend that, if the Panel's findings result in a determination that the imported product was not dumped or did not cause injury, or that product was dumped to a lesser extent than the duties actually imposed, the DSB request that the United States revoke its anti-dumping duty order and reimburse anti-dumping duties collected.[20] In so doing, Japan has requested a specific remedy that is inconsistent with established GATT/WTO practice and the DSU. Therefore, should the Panel agree with Japan on the merits, the Panel nonetheless should reject the requested remedy, and instead should make a general recommendation, consistent with the DSU and established GATT/WTO practice, that the United States bring its anti-dumping measure into conformity with its obligations under the AD Agreement.

32. The specific remedy[21] of revocation requested by Japan goes far beyond the type of remedies recommended by the overwhelming preponderance of prior GATT 1947 and WTO panels. In virtually every case in which a panel has found a measure to be inconsistent with a GATT obligation, panels have issued the general recommendation that the country "bring its measures . . . into conformity with GATT."[22] This is true not only for GATT disputes, in general, but for disputes involving the imposition of anti-dumping (and countervailing duty) measures, in particular.[23]

33. This well-established practice is codified in Article 19.1 of the DSU, which provides:

> Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. (footnotes omitted).

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[20] First Submission of Japan at para. 325 (d) and (e).

[21] By "specific" remedy, the United States means a remedy that requires a party to take a particular, specific action in order to cure a WTO-inconsistency found by a panel.

[22] *See, e.g., Canada - Measures Affecting Exports of Unprocessed Herring and Salmon,* L/6268, Report of the Panel adopted 22 March 1988, BISD 35S/98, 115, para. 5.1. The United States will spare the Panel a lengthy citation of all other panel reports in which panels have made recommendations using similar language; the number of such reports is well in excess of 100.

[23] *See, e.g., Canadian Countervailing Duties on Grain Corn from the United States*, SCM/140 and Corr. 1, Report of the Panel adopted 28 April 1992, BISD 39S/411, 432, para. 6.2; *Korean Resins*, ADP/92, para. 302.

34. Indeed, in the first case to work its way through the WTO dispute settlement system, the recommendations of both the panel and the Appellate Body carefully adhered to Article 19.1.[24]

35. The requirement that panels make general recommendations reflects the purpose and role of dispute settlement in the WTO, and, before it, under GATT 1947. Article 3.4 of the DSU provides that "[r]ecommendations and rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter," and Article 3.7 provides that "[a] solution mutually acceptable to the parties to a dispute . . . is clearly to be preferred." To this end, Article 11 of the DSU directs panels to "consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution." Ideally, a mutually agreed solution will be achieved before a panel issues its report. However, if this does not occur, a general panel recommendation that directs a party to conform with its obligations still leaves parties with the necessary room to cooperate in arriving at a mutually agreed solution.[25]

36. Indeed, a Member generally has many options available to it to bring a measure into conformity with its WTO obligations. A panel cannot, and should not, prejudge by its recommendation the solution to be arrived at by the parties to the dispute after the DSB adopts the panel's report.

37. In addition, the requirement that panels issue general recommendations comports with the nature of a panel's expertise, which lies in the interpretation of covered agreements. Panels

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[24] In *Reformulated Gasoline*, the Appellate Body recommended "that the Dispute Settlement Body request the United States to bring the baseline establishment rules contained in Part 80 of Title 40 of the Code of Federal Regulations into conformity with its obligations under the *General Agreement*." WT/DS2/AB/R, p. 29. The panel in that case issued a virtually identical recommendation. WT/DS2/R, Report of the Panel, as modified by the Appellate Body, adopted 20 May 1996, para 8.2.

Even more noteworthy is *Japan Taxes*, in which the Appellate Body recommended "that the Dispute Settlement Body request Japan to bring the Liquor Tax Law into conformity with its obligations under the General Agreement on Tariffs and Trade 1994." WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at 34.

[25] As noted by Prof. Jackson:

> One of the basic objectives of any dispute procedure in GATT has been the effective resolution of the dispute rather than "punishment" or imposing a "sanction" or obtaining "compensation." This objective has been recognized explicitly by GATT committees. The prime objective has been stated to be the "withdrawal" of a measure inconsistent with the General Agreement.

John H. Jackson, *World Trade and the Law of the GATT* 184 (1969) (citations omitted).

generally lack expertise in the domestic law of a defending party.[26] Thus, while it is appropriate for a panel to determine in a particular case that a Member's legislation was applied in a manner inconsistent with that country's obligations under a WTO agreement, it is not appropriate for a panel to dictate which of the available options a party must take to bring its actions into conformity with its international obligations.

38. Japan's proposed remedy is particularly inappropriate in view of the arguments that it makes in this case. Although Japan contests certain aspects of the Department's dumping margin calculations, even if the Department were to calculate the margins as Japan prefers, it would still find Japanese imports to be sold at dumped prices. Likewise, as has been seen, Japan does not contend that the Commission could not reach an affirmative determination on the evidence before it, but rather that certain findings in one of the three USITC opinions reaching an affirmative determination were erroneous. Indeed, even if Japan were successful in its challenge to the United States statute's captive production provision, such a holding by the panel would not affect the decisions of a dispositive plurality of USITC Commissioners. Thus, even on Japan's own arguments, it would be possible for the United States authorities to reach revised determinations in response to an adverse panel decision that would not necessitate terminating the anti-dumping order. Especially in this case, it should be for the WTO Member and its investigating authorities to decide how to conform their measures to any adverse Panel findings.

39. The compliance process under the DSU makes the precise manner of implementation a matter to be determined in the first instance by the Member concerned, subject to limited rights to compensation or retaliation by parties that have successfully invoked the dispute settlement procedures. In Article 19 of the DSU, the drafters precluded a panel from prejudging the outcome of this process in their recommendations.

40. In sum, specific remedies are at odds with established GATT and WTO practice and the express terms of the DSU. Therefore, regardless of how the merits of this case are decided, Japan's request for specific remedies should be rejected.

## CONCLUSION

41. Based on the foregoing, the United States respectfully requests the Panel to find that:

- The information submitted to this Panel by Japan that was not made available to U.S. authorities during the course of the anti-dumping investigation at issue will

[26] Indeed, Article 8.3 of the DSU provides that citizens of Members whose governments are parties to a dispute normally shall not serve on a panel concerned with that dispute, absent agreement by the parties.

be disregarded in this proceeding;

- Japan's claim concerning the United States's general practice with respect to "facts available"July 21, 2000 was not raised in Japan's request for the establishment of a panel and is therefore not included in this Panel's terms of reference;

- The specific anti-dumping measures imposed by the United States on hot-rolled steel from Japan are consistent with the provisions of the Anti-Dumping Agreement identified by Japan in its submission at para. 325 (a);

- None of the actions identified by Japan in its submission at para. 325 (b) was inconsistent with Article X:3 of the GATT 1994;

- The United States' anti-dumping laws, regulations, and administrative procedures governing the issues identified by Japan in its submission at para. 325 (c) are not inconsistent with the provisions of the Anti-Dumping Agreement identified in that paragraph.

- The specific remedies requested by Japan in its submission at para. 325 (d) and (e) are contrary to established practice and the DSU.